Supreme Court, U.S.
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No. 09-914

IN THE
Supreme Court of the United States

JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE LOTTERY OFFICE,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Professional and Amateur Sports Protection Act ("PASPA") prohibits Delaware from offering sports lotteries to generate revenues to help alleviate its substantial budget deficits and satisfy its constitutional balanced-budget obligations.

2. Whether the panel below erred as a matter of law in deciding the merits in an appeal of a denial of a preliminary injunction brought pursuant to 28 U.S.C. § 1292(a), where the factual record had not been developed and final adjudication of the merits turned on contested factual considerations.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

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PETITION FOR CERTIORARI

Petitioners, Jack Markell, Governor of the State of Delaware, and Wayne Lemons, Director of the Delaware State Lottery Office (collectively "Delaware"), petition for a writ of certiorari to review the judgment of the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (App. 1a-20a) is reported at 579 F.3d 293 (3d Cir. 2009). The order denying Delaware's petition for rehearing en banc (App. 59a-60a) is not reported. The district court denied Plaintiffs-Respondents' motion for a preliminary injunction in an August 5, 2009 oral ruling (App. 29a-58a), which was confirmed in an August 10, 2009 written order (App. 21a-28a). Neither district court ruling is reported, but the August 10, 2009 ruling is available at 2009 WL 2450284 (D. Del.).

JURISDICTION

The court of appeals entered its opinion and judgment on August 31, 2009. App. 1a. Delaware filed a timely petition for rehearing on September 14, 2009, which was denied on September 29, 2009. App. 60a. Delaware timely sought an extension of time for the filing of a petition for certiorari on December 18, 2009. That motion was granted on December 21, 2009, extending the time for filing until January 27, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved – the Tenth Amendment of the Constitution and Sections 3701, 3702 and 3704 of Title 18, the Professional and Amateur Sports Protection Act – are set forth at App. 61a-64a.

INTRODUCTION AND SUMMARY OF ARGUMENT

By this petition, the State of Delaware seeks to vindicate its traditional and fundamental right to raise revenues in the manner it deems fit in a time of fiscal crisis. Based on Delaware's historic use of a sports-lottery scheme to raise funds, Congress exempted Delaware (and several similarly-situated states) from the prohibition on sports gambling enacted in the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. But, when Delaware sought to address its budget needs by reinstituting a sports lottery, plaintiffs here – the Office of the Commissioner of Baseball ("MLB"), the National Basketball Association ("NBA"), the National Collegiate Athletic Association, the National Football League ("NFL"), and the National Hockey League ("NHL") (collectively, "Sports Leagues") – filed an eleventh-hour lawsuit to enjoin Delaware from conducting its sports lottery.

The district court denied the preliminary injunction motion, but nevertheless expedited disposition of the case. On appeal, and absent any request by the Sports Leagues, the Third Circuit converted their appeal from the denial of injunctive relief into an appeal on the underlying merits of the lawsuit. The court enjoined Delaware from conducting the specific lottery games it had announced and issued broad prohibitions on future Delaware games – prohibitions

that will prevent Delaware from effectively exercising important rights Congress expressly reserved to it. App. 19a-20a. The court acted even though Delaware had not had an opportunity to brief or present evidence to the trial court relevant to the scope of the sports-gambling games Congress preserved for the State.

The PASPA exceptions at issue are relevant only to the few States that had sports-gambling schemes prior to its enactment. It is thus improbable that a mature conflict on their interpretation will develop. Yet, the Third Circuit has permanently stripped Delaware of an historic sovereign prerogative that Congress had preserved and the State had invoked to address its fiscal challenges. The scope of this PASPA exception is of critical importance to Delaware which sought to exercise its reserved authority under PASPA as part of a comprehensive response to its budget crisis. And, this ruling was announced in an unfair, truncated proceeding in which Delaware was denied the opportunity to proffer evidence relevant to the scope of its retained rights. Where, as here, the matter touches on State sovereignty, involves interpretation of a federal statute, is of vital importance to the affected State, and the issue will otherwise escape review, this Court should grant the petition.

Moreover, the court of appeals decision contravenes this Court's precedent and is the product of several legal errors which independently warrant review.

PASPA's general prohibition on sports gambling does not apply to a sports-gambling scheme in a State "to the extent that the scheme was conducted by that State . . . at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a)(1). The court of appeals found that

this language is plain. It refused to apply to this provision this Court's instruction that a statute should not be interpreted to constrain a State's "substantial sovereign powers" unless Congress makes that constraint ""unmistakably clear."" *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). Instead, it held that Delaware retained the power to offer a sports lottery only to the "degree" it had "actually conducted" a sports lottery, App. 14a-15a (emphasis omitted), and therefore that Delaware could not even apply its past lottery scheme "to new sports," App. 19a, or offer a lottery on single games.

The Third Circuit's cramped interpretation of Congress's reservation of State authority cannot be reconciled with *Gregory* and its progeny. The court of appeals found that PASPA's *general prohibition* of sports gambling is a "clear statement" under *Gregory*, App. 17a-18a; but it was applying the requirement to the wrong statutory provision. The court erroneously failed to consider whether the express *statutory preservation of Delaware's rights* "unmistakably" forbid the State to conduct the sports lottery it proposed.

It does not. The statutory phrase can fairly be read to reserve to Delaware the right to offer any sports lottery that State law permitted in the 1970's. Indeed, the legislative history detailed *infra* strongly supports the State's reading. At a minimum, by preserving Delaware's right to conduct a "scheme" that it conducted in the 1970's, PASPA allows Delaware to conduct a state-controlled sports lottery akin to those that were part of the 1970's scheme and does not restrict Delaware to the specific sports or rules used to flesh out that scheme.

The Third Circuit's contrary conclusion contravenes Congress' intent and is wrong. Had the Third Circuit

recognized PASPA's ambiguity, it would have considered, *inter alia*, the relevant Senate Report, which states that PASPA "is not intended to prevent Oregon or Delaware from expanding their sports-betting schemes into other sports so long as it was authorized by State law prior to the enactment of this Act," S. Rep. No. 102-248, at 10 (1991). It also would have allowed the development of an evidentiary record about whether the proposed sports lottery differs substantially from the sports lottery prior to PASPA.

The court of appeals' failure to recognize the Act's ambiguity led to another legal error. As noted, that court *sua sponte* converted the Sports Leagues' appeal of the denial of the preliminary injunction to an appeal on the underlying merits. The court held, *as a matter of law*, that no factual development would illuminate whether Delaware's proposed sports-gambling scheme is sufficiently similar to Delaware's past scheme to be lawful under PASPA. This error could have been avoided had the court remanded the case to allow the district court to consider evidence that Delaware would have offered – *i.e.*, expert testimony that a sports lottery on a slate of NFL games constitutes the same scheme as a sports lottery on a slate of MLB games, or that as a matter of statistical probabilities, betting on multiple NFL games is not significantly different than betting on single games. See *infra* at 17.

This Court has stated that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Federal courts do so only where "the facts are established or of no controlling relevance," *Thornburgh* v. *Am. Coll. of Obstetricians &*

Gynecologists, 476 U.S. 747, 757 (1986). Such action is even more extraordinary where, as here, plaintiffs did not request merits review, and the trial court had *declined* to issue a preliminary injunction prior to full briefing on the motion, foreclosing the State's ability to proffer its evidence before appeal.

The question whether Delaware's proposed sports lottery is sufficiently similar to its past lottery to pass muster under PASPA is not a matter of judicial intuition. It is a fact-intensive question that is the proper subject of expert and other testimony. The court's decision to address the merits here contravenes this Court's decisions and those of numerous courts of appeals holding that an appellate court may decide the merits on review of a preliminary injunction *only* in cases presenting a pure legal issue and requiring *no* factual development. See *infra* at 30.

The court of appeals infringed upon the State's sovereign prerogative to raise revenues and address its budget problems. This outcome is acceptable only where Congress "unmistakably" states that it is taking such action; but here, Congress preserved Delaware's traditional authority. This Court should grant the petition and provide Delaware with the opportunity to make its case that the court of appeals denied it.

STATEMENT OF THE CASE

1. *Delaware's Initial Sports Lottery.* In 1973, the Delaware Constitution was amended to authorize "Lotteries under State control for the purpose of raising funds." Del. Const. art. II, § 17(a). The Delaware General Assembly implemented this constitutional provision in 1974, creating the Delaware State Lottery and State Lottery Office. The

implementing legislation broadly defined "lottery" as "public gaming systems or games established and operated pursuant to this subchapter and including all types of lotteries." Del. Code Ann. tit. 29, § 4803(d). Relevant here, the implementing legislation specifically authorized "any game" including games that "affiliate the determination of the winners of a game with any racing or sporting event held within or without the State." *Id.* § 4805(b)(4).

Pursuant to this authority, in August 1976, the Delaware State Lottery Office announced a plan to institute a sports-based lottery, known as "Scoreboard." *NFL* v. *Delaware*, 435 F. Supp. 1372, 1376 (D. Del. 1977). Scoreboard involved three games (Football Bonus, Touchdown, and Touchdown II) that were based on the outcomes of NFL contests.[1] *Id.*

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[1] The three games had a range of features. In Football Bonus, the fourteen NFL games scheduled each weekend were divided into two seven-game pools. Customers projected the winners of the seven games in one or both pools and bet between $1 and $10. To win, the customer had to correctly select the winner of all games in a pool. The prizes awarded were determined on a pari-mutuel basis (*i.e.*, as a function of the amount of money bet by *all* customers). *See NFL*, 435 F. Supp. at 1376.

In Touchdown, a lottery card listed the fourteen games for each week with three possible point-spread ranges. The customer had to select the winning team and the winning margin in three, four or five games. A customer would bet between $1 and $10, and prizes were distributed on a pari-mutuel basis. *Id.*

Finally, in Touchdown II, prior to each weekend's games, a predicted point or "line" would be published. Customers considered that point spread and selected a team to "beat the line" (to do better than the stated point spread). To win, the customer had to choose correctly in from four to twelve games.

Tickets for these games could be purchased from merchants throughout the State. *Id.*

Immediately thereafter, the NFL sued to enjoin Delaware's lottery. *Id.* at 1375. The district court rejected the NFL's request for a temporary restraining order and most of its claims. *Id.* at 1375, 1391.

During this time period, Delaware actively considered expanding its lottery to other sports. Specifically, lottery officials contemplated whether to change the types of games offered and whether to expand the lottery to hockey and basketball contests.[2] Delaware, however, ceased offering a sports lottery after the 1976 NFL season.

2. *PASPA's Enactment.* Delaware is not the only state to offer sports betting. Nevada had long offered single-game sports wagering; and in September 1989, Oregon also initiated a lottery based on NFL games that it subsequently expanded to NBA games. 137 Cong. Rec. 255, 256 (1991). Shortly after Oregon did so, Congress began to consider legislation to prohibit the States to raise revenues through sports-based lotteries. See, *e.g.*, *id.*; H.R. 4842, 101st Cong. (1990); S. 474, 102d Cong. (1991).[3]

Although the Department of Justice expressed strong concerns that the legislation raised "federal-

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Based on the number of games bet, the prize was a fixed payoff of $10 to $1,200. *Id.*

[2] *See, e.g.*, Simmons Dep., at 76-77, *NFL* v. *Tribbitt*, No. 76-273 (D. Del. Aug. 20, 1976) (Director of the Delaware State Lottery Office); *id.* at 206-08, 226-27 (D. Del. Oct. 27, 1976); Stipulation of Facts, ¶ 31, *id.* (D. Del. Nov. 15, 1975).

[3] As Congress considered this legislation, Montana enacted a statute that "allow[ed] for fantasy sports leagues and sports tab games." 138 Cong. Rec. 12971, 12973 (1992).

ism issues" by interfering with states' ability to raise revenues,[4] Congress nonetheless enacted PASPA in 1992. PASPA reflects a substantial legislative compromise. 28 U.S.C. §§ 3701-3704. It prohibits betting on professional and amateur sports, *id.* § 3702, but "grandfathers" the handful of states such as Delaware that had offered sports-gaming schemes prior to PASPA's enactment, *id.* § 3704(a)(1)-(2).[5] Particularly relevant here, § 3704(a)(1) creates an exception from PASPA's sports-betting prohibitions for "a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." This exception encompasses Delaware due to the State's sports-based lottery offered in 1976.

PASPA's legislative history confirms that Congress intended Delaware and the few other grandfathered states to retain the right to offer a broad array of sports-based lotteries. The Senate Report explained:

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[4] *See* Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Joseph R. Biden, Jr., Chairman, Committee on the Judiciary 2 (Sept. 24, 1991); Letter from W. Lee Rawls, to Sen. Dennis DeConcini, Committee on the Judiciary 2 (Sept. 24, 1991).

[5] PASPA also provided a prospective exemption for Atlantic City, New Jersey, 28 U.S.C. § 3704(a)(3). New Jersey, however, did not enact sports gaming in the window PASPA provided and the Act now also prohibits sports gaming in New Jersey. PASPA's constitutionality is being challenged in New Jersey. *See* Complaint, *Interactive Media Entm't & Gaming Ass'n* v. *Eric H. Holder*, No. 2:33-av-00001 (D.N.J., filed Mar. 23, 2009).

> Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful gambling schemes in other States that were in operation when the legislation was introduced. Therefore, it provides an exemption for those sports gambling operations which were already are permitted under State law . . . .

S. Rep. No. 102-248, at 8.

The Senate Report further clarified that the Senate did not intend PASPA to prevent Delaware from expanding its lottery into other sports beyond football if the new games were permitted under existing State law:

> Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those states prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting.

Id. at 10.

Finally, shortly before the bill's passage, Senator DeConcini, a sponsor and floor manager, explained the purpose of the exceptions:

> The intent of the legislation is not to interfere with existing laws, operations or revenue streams. Therefore, it provides an exemption for those sports gambling operations which already are permitted under State law.
>
> . . . .
>
> Let me make clear that the grandfather provision only allows those States that have sports gambling authorized by State law to continue to do what they are doing now or could do under State law.

138 Cong. Rec. 12971, 12973 (1992).

Reinforcing this point, the bill was changed as it moved toward passage to broaden the relevant exception by removing or enlarging terms that might have suggested a narrower reading. The initial version of the Senate bill permitted a State to offer a lottery or other gambling "activit[ies]"

> to the extent that *such* activity *actually* was conducted by that State prior to August 31, 1990, or was conducted in the State between September 1, 1989, and August 31, 1990.

S. 474 (Feb. 22, 1991) (emphasis added).[6]

Then, when the Judiciary Committee considered the bill, its language was modified to allow lottery or other gambling "scheme[s]" (rather than "activities")

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[6] The "activity actually was conducted" language also appeared in the bill's early House version. *See* 137 Cong. Rec. at 257.

and amended to confirm that the temporal scope of the exception covered Delaware. It also continued to contain language ("particular scheme actually . . . conducted") that narrowed this exception. Specifically, at that time, the exception permitted States to operate lottery and gambling "schemes"

> to the extent that the *particular scheme actually was conducted* by that State or other governmental entity *prior to August 31, 1990.*

Id. (Nov. 23, 1991) (emphasis added).

Finally, upon final Senate consideration of the bill, the terms "particular" and "actually" had been stricken and the temporal application of the exception further clarified to confirm its application to Delaware. In this version, the exception broadly allowed lottery and gambling "scheme[s]"

> to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990.

138 Cong. Rec. at 12972. This language was ratified by the Senate and the House without modification.

3. *Delaware's Fiscal Crisis and Reintroduction of a Sports Lottery.* Delaware, like many states, is facing a fiscal crisis. For the 2010 fiscal year (July 1, 2009 to June 30, 2010), Delaware projected a record budget deficit. Delaware's constitution requires a balanced budget. *In re Request of the Governor for an Advisory Opinion*, 2009 Del. LEXIS 255, at *7 (Del. May 27, 2009).

In March 2009, accordingly, Governor Markell proposed to re-introduce a sports lottery in Delaware as part of a comprehensive solution to the projected budget deficit. As before, the proposed sports lottery

would be under control of the State. Appellants' Third Circuit Appendix ("AA") 164. All revenues earned would "be used for administration of the Delaware Lottery and/or contributed to the General Fund." *Id.*

Also in March 2009, Governor Markell requested the Delaware Supreme Court to issue an advisory opinion on whether the proposed sports lottery would comply with Delaware's Constitution. AA 162. The Governor stated that Delaware intended to offer three different sports-lottery games:

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcomes on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets, or the winner of one or more games and one or more over-under bets.

AA 164. Unlike its prior lottery that awarded some prizes on a "pari-mutuel" basis, prizes for the new sports lottery would be awarded on a fixed-payout basis. *Id.*

Given the urgency of the fiscal crisis, the General Assembly acted promptly and enacted House Substitute No. 1 to House Bill 100 (hereinafter "the Sports Lottery Act"), which the Governor signed on May 14, 2009. The Sport Lottery Act, *inter alia*, mandated that the Director of the Delaware Lottery "shall" use his existing authority granted in the 1974

lottery legislation to establish a sports lottery (including necessary regulations). Del. Code Ann. tit. 29, § 4825(a). The lottery required the sports lottery to "produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the state." *Id.* The legislation also directed that the lottery be conducted at three existing Delaware "racinos" that offer horse racing and on-site "video" lotteries. *Id.* § 4825(c).[7]

The Delaware Supreme Court accepted the Governor's request to issue an advisory opinion. It held oral argument on May 21, 2009, and permitted the NFL to appear as *amicus curiae*. Six days later, the court issued a unanimous decision generally holding that the proposed games would not violate the Delaware Constitution. *In re Request of the Governor for an Advisory Opinion*, 2009 Del. LEXIS 255.

The court opined that the Delaware Constitution permits "'not only games of pure chance but also games in which chance is the dominant determining factor.'" *Id.* at *21. The court concluded that chance is the "dominant" factor for the proposed parlay games (*i.e.*, games requiring the player to select the winner of two or more elements), but that further evidence needed to be developed to analyze the constitutionality of the proposed single-game lotteries. *Id.* at *24-25.

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[7] Because Delaware likewise shares in the revenues earned by the video lotteries operated at these three facilities (a share increased by the 2009 legislation), the Sports Lottery Act allowed Delaware to earn new revenues not only from the sports lottery, but also from new customers attracted to "racinos" by the sports lottery. *See generally* AA 317-30.

Following the Delaware Supreme Court's favorable ruling, the State Lottery Director published proposed sports-lottery regulations. App. 4a; AA 167-90. Those regulations confirmed the Governor's stated intention to offer single-game betting and parlay betting. App. 4a; AA 168. Further, they broadly defined a "sports lottery" to include betting "'in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team.'" *Id.* State officials announced that the sports lottery would commence September 1, 2009, immediately before the 2009-2010 NFL season. App. 4a; AA 319. Delaware also intended to offer a lottery for baseball and college football, and to expand it thereafter to other sports. App. 4a.

On July 1, 2009, the Governor signed a budget for the fiscal year 2010. That budget was constitutionally balanced in part by the expected $17 million in revenues from a sports lottery. AA 330.

4. *The District Court Proceedings.* On July 24, 2009, roughly ten weeks after the Sports Lottery Act was enacted, the Sports Leagues filed this action. Count I of their Complaint alleged that PASPA limits Delaware "to reinstituting at most the three Scoreboard parlay games that were conducted in the fall of 1976." AA 29. Count II asserts that lotteries based on a single contest are not "lotteries" under the Delaware Constitution. *Id.* at 31.

On July 28, 2009, the Sports Leagues moved for a preliminary injunction based on Count I, seeking to enjoin Delaware from offering "(i) single-game sports betting, (ii) betting on sports other than . . . profess-

sional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." AA 35. The Sports Leagues argued that PASPA forbids Delaware to conduct any game "other than one with the specific attributes of the sports lottery conducted by Delaware in 1976." *Id.* at 68.

The next day, the district court scheduled a teleconference. During the conference, the court raised questions about the Sports Leagues' irreparable-harm showing. AA 240, 265-66. The court did not rule on the preliminary-injunction motion, but instead ordered the parties to "meet-and-confer" about a "reasonably expedited" schedule. *Id.* at 267. The court set another scheduling conference for August 5, 2009.

On August 3, 2009, however, the Sports Leagues changed tack; they filed a letter suggesting that the court hold the preliminary injunction proceeding in abeyance and resolve Count I through partial summary judgment. AA 270-80. Under this approach, the Sports Leagues apparently sought to avoid demonstrating irreparable harm.

Delaware responded that day, agreeing that the parties had failed to reach a consensus on process and further arguing that the Sports Leagues must demonstrate irreparable injury to obtain a permanent injunction. AA 314-15. The following day the State also submitted affidavits to respond to questions raised at the initial conference about the lottery's expected revenues. *Id.* at 317-30. An affidavit from the State's Acting Secretary of Finance explained that Delaware's budget for fiscal year 2010 included a "conservative" estimate of $17 million of revenues from re-implementing the sports lottery over a ten-month period (albeit not including revenues from

single-game lotteries). *Id.* at 329-30. Of this amount, $3 million was attributable directly to the sports-lottery games and the remaining $14 million to additional video-lottery revenue from the commencement of the sports lottery. *Id.* Under the same forecast, approximately $15 million in additional revenue would be earned by the three venues offering the sports lottery. *Id.* at 330. Delaware also submitted affidavits on behalf of the three "racinos" that would operate the sports-lottery venues, explaining the negative impact that an injunction would have on their revenues, investments and hiring. *Id.* at 317-28.

At the August 5, 2009 conference, the parties remained divided about how the case should proceed. Delaware emphasized that it had not had an opportunity to submit a brief, take discovery, or present evidence on the merits. App. 37a. For example, Delaware had no opportunity to offer testimony demonstrating that its proposed lotteries are substantively similar to its prior lotteries, that it had considered expanding its prior lotteries to other sports in the 1970's and could have done so without fundamentally changing the games, and that it could be demonstrated that multi-game betting can be done in ways that replicate the results of single-game betting. See, *e.g.*, Ray C. Fair & John F. Oster, *College Football Rankings And Market Efficiency*, 8 J. Sports Econ. 3, 13 (2007). The Sports Leagues, however, claimed that the case could "be adjudicated on a summary proceeding." App. 35a.

The district court denied the preliminary-injunction motion at the status conference, concluding further briefing or factual development was unnecessary to denial of the motion. App. 40a. The court found that the Sports Leagues failed to establish a likelihood of

success on the merits. *Id.* at 41a-42a. Further, the court observed "there may exist factual disputes as to what, if anything, the State actually did in the past with respect to sports gambling; or, as to what, if any, proposed sports betting activities are exempted by the federal statute." *Id.* at 42a. The court also found that the Sports Leagues failed to establish that the traditional equitable factors supported an injunction. In particular, the court noted that the State "intend[ed] to use moneys raised from the activities at issue in this case to help balance the State's budget." *Id.* at 46a. The court ordered expedited discovery for a trial starting December 7, 2009. *Id.* at 46a-54a.

On August 7, 2009, the Sports Leagues appealed. App. 6a. On August 10, the district court confirmed its oral ruling with a written memorandum. *Id.* at 21a-28a.

5. *The Court of Appeals.* The Third Circuit expedited the appeal. It ruled from the bench immediately after oral argument on August 24, 2009, and issued its opinion on August 31, 2009, just prior to the planned start of the sports lottery. The court did *not* resolve whether the district court had properly refused to enter a preliminary injunction. Instead, the court *sua sponte* reached the merits and concluded that PASPA prohibited vital elements of Delaware's planned lotteries. App. 2a, 19a-20a.

The panel acknowledged that, in reviewing the grant or denial of a preliminary injunction, it should ordinarily "'go no further into the merits than is necessary to decide the interlocutory appeal.'" App. 8a-9a. Nonetheless, the court concluded that this Court created an exception to this procedure in *Thornburgh*, 476 U.S. at 757. There, this Court reached the merits on appeal of a preliminary injunc-

tion where there was "an unusually complete factual and legal presentation to address the important constitutional issues at stake" and the "'district court's ruling rest[ed] solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.'" App. 9a-10a (quoting *Thornburgh*, 476 U.S. at 757 & n.8). Although neither party asked the Third Circuit to rule on the merits, the court announced that it had "reviewed the record" and found no dispute about the material facts, which the court identified as the "scope and extent of Delaware's gambling scheme" in 1976 and now. *Id.* at 12a.

Turning to the "merits," the Third Circuit found the "to the extent" language in § 3704(a)(1) requires an examination of the "degree" to which a lottery was conducted by Delaware in 1976. App. 14a-15a. The court thus concluded that the scope of the § 3704(a)(1) exception is tied to the "specific means by which the lottery was actually conducted." *Id.* at 14a (emphasis omitted). The court apparently recognized, however, that taking this "plain language" interpretation to its logical conclusion would produce absurd results because it would require that any lottery conducted by Delaware "be identical in every respect to what the State conducted in 1976." *Id.* at 19a. The court thus created an "exception" to the § 3704(a)(1) exception, ruling "[c]ertain aspects . . . may differ" "as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period." *Id.* The court did not address how a court or the parties should determine whether a proposed change is "substantive."

In so holding, the Third Circuit rejected the principal arguments advanced by Delaware. The court concluded that *Gregory*, 501 U.S. at 461 – which

requires a court to "'interpret a statute to preserve rather than destroy [a] State['s] substantial sovereign powers'" absent "'an unmistakably clear expression'" to the contrary by Congress – was irrelevant here because Congress in PASPA clearly intended to limit the ability of States to sponsor sports-gambling. App. 17a-18a. Likewise, the court held that PASPA's legislative history could be ignored – including statements that § 3704(a)(1) permitted excepted states to offer lotteries broader in scope than those previously conducted – on the grounds that the exception was "unambiguous" and, alternatively, that the legislative history was "inconclusive at best." *Id.* at 16a, 17a n.5.

Applying its reading of PASPA, the Third Circuit found that the proposed Delaware lottery went beyond what was permitted by the § 3704(a)(1) exception. Specifically, the court concluded that because Delaware "'conducted'" lotteries involving only NFL teams in 1976, it can only offer lotteries involving NFL teams and no other sports leagues today, even if the lotteries are otherwise identical to the 1976 games. App. 20a. In addition, because Delaware had previously offered only multi-game "parlay" lotteries, it could not now offer "single-game" betting. *Id.* The court did, however, state that Delaware could sell tickets at different venues than in 1976 and was not constrained by the schedule and number of teams that existed in 1976. *Id.* at 19a.

Following the Third Circuit's ruling, the district court entered a final order permanently enjoining Delaware from offering lotteries on sporting contests other than those involving the NFL and requiring the lottery to consist of a parlay of at least three NFL games. *Office of the Comm'r of Baseball* v. *Markell*, No. 09-538 (GMS) (D. Del. Nov. 9, 2009) (Final

Order). Delaware currently sponsors such a limited sports-lottery.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether PASPA precludes Delaware from operating sports lotteries that were created as part of a comprehensive effort to address the State's fiscal crisis. Although PASPA generally prohibits sports-related gambling by States, it preserves the right of certain States to operate a sports lottery "scheme . . . to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a)(1). The Third Circuit's narrow reading of this exception intruded on Delaware's sovereignty in a circumstance where there was no "reason to believe, either from the text of the statute, the context of its enactment, or its legislative history, that Congress . . . intended such an alteration of the federal balance." *Hayden* v. *Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (en banc). And, the Third Circuit reached this holding in a procedural posture that was manifestly unfair to Delaware.

I. THE THIRD CIRCUIT WRONGLY CONCLUDED THAT CONGRESS HAS PROHIBITED DELAWARE FROM ADOPTING A SPORTS-LOTTERY SCHEME TAILORED TO MEET ITS REVENUE-GENERATING NEEDS.

1. PASPA is clearly an intrusion on state sovereignty, as the Department of Justice recognized in commenting on the legislation. See *supra* n.4. Thus, the starting point for interpreting PASPA's application in this case is the seminal decision in

Gregory, 501 U.S. at 461. There, this Court held that "'[i]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Id.* at 460. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. See also U.S. Const. amend. X.[8]

The Third Circuit's analysis is flatly contrary to *Gregory*. According to that court, *Gregory* was inapplicable because PASPA "unmistakably prohibits state-sponsored gambling." App. 18a. Although true, the court of appeals' statement misses the relevant point. In *Gregory*, it was likewise true that the Age Discrimination in Employment Act ("ADEA") requirements at issue were generally applicable to States. See *Gregory*, 501 U.S. at 467 ("the ADEA plainly covers all state employees except those excluded by one of the exceptions"). But the Supreme Court nonetheless determined that a clear statement by Congress was required before the ADEA's restrictions on state mandatory-retirement laws could be read to apply to a particular group of state officials (judges). *Id.* Specifically, this Court found that even though it was unclear whether judges were "policymakers" and

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[8] Since *Gregory*, this Court has reaffirmed this foundational principle of state sovereignty. *See, e.g.*, *Raygor* v. *Regents*, 534 U.S. 533, 543-44 (2002) (clear-statement principle "applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'") (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

thus within a statutory exception to ADEA coverage, it "w[ould] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.*

Gregory thus instructs that PASPA can be construed so as to interfere with the exercise of sovereign powers by Delaware only if it is "unmistakably clear" that Congress intended such a reading. As this Court has explained, under *Gregory*, when a court is "confronted [with] a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers .... absent a clear indication of Congress' intent to change the balance, the proper course [is] to adopt a construction which maintains the existing balance." *Salinas* v. *United States*, 522 U.S. 52, 59 (1997); see also *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires").

Indeed, *Gregory*'s federalism principles apply with particular force here because Delaware is exercising the core sovereign function of raising revenues in order to comply with its constitutional balanced-budget requirement. See, *e.g.*, *Leigh* v. *Green*, 193 U.S. 79, 89 (1904) (states have a "sovereign power to raise revenues essential to carry on the affairs of state and the due administration of the laws").

Certiorari is necessary to correct the Third Circuit's failure to follow *Gregory* and its concomitant decision to read PASPA as precluding Delaware from taking the steps it deemed necessary to help resolve its fiscal

crisis. The scope of the § 3704(a)(1) exception is, at minimum, ambiguous. To be sure, the Third Circuit initially suggested that the provision is "unambiguous" and turns on the "specific means by which the lottery was actually conducted." App. 14a-16a (emphasis omitted). Yet, the Third Circuit immediately thereafter determined that the § 3704(a)(1) exception must be given a broader interpretation to prevent "'absurd'" results and achieve the "policy" objectives of PASPA. *Id.* at 19a. To reflect these considerations, the court ultimately announced that § 3704(a)(1) permits Delaware to make changes from "the specific means by which the lottery was actually conducted" in 1976 so long as those changes are not "substantive." *Id.* at 14a, 19a (emphasis omitted).

The Third Circuit's own interpretation of PASPA thus recognizes that § 3704(a)(1) does not require Delaware's current lottery to be "identical" to its 1976 lottery and instead permits a range of differences. The statute, however, provides no "clear statement" that the line be drawn in the manner directed by the court of appeals. Nothing in PASPA's text suggests what a "substantive" change is, let alone makes that the touchstone for evaluating the exception's scope.

In contrast, Delaware advanced a reading of the § 3704(a)(1) exception that was faithful to its text and that "read [the provision] in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140. Although Delaware acknowledges that the PASPA exception does not allow Delaware to offer any sports-gambling scheme it chooses, it can reasonably be read to allow the State to offer sports-lottery games that the State's 1970's scheme permitted. At least, it preserves the State's right to offer games akin to those that were part of the 1970's scheme. Even if Delaware's reading of the exception

is not compelled by the plain language, it is plausible and thus compelled by *Gregory* and its progeny.

First, although the Third Circuit concluded that phrase "to the extent" in § 3704(a)(1) should be interpreted to mean "the specific means by which the lottery was actually conducted," App. 14a (emphasis omitted), or the "degree[] to which" the lottery was actually conducted, *id.* at 15a, this phrase can just as easily be read to mean "if" a lottery was conducted in the designated period. *Id.* at 19a. Under such a reading, the phrase "to the extent" identifies a condition for application of the exception – *i.e.*, that a state-controlled lottery was conducted prior to PASPA.

This reading of the phrase is reinforced by PASPA's structure. Congress used the same "to the extent" phrase in another of PASPA's exceptions, § 3704(a)(3). In that exception, the phrase is clearly used as a synonym for "if."[9] Courts generally "conclude that Congress intended the same construction of the same language in [a] parallel provision." *Hillsboro Nat'l Bank* v. *Comm'r*, 460 U.S. 370, 402 (1983); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

In conclusory fashion, the Third Circuit opined that it was inappropriate "to draw parallels" between § 3704(a)(1) and § 3704(a)(3) because the latter "deals with casinos[,] differ[ing] in subject matter, structure, and syntax from the language of § 3704(a)(1)." App. 15a-16a. The court's conclusion is belied by a simple comparison of the two provisions. Both § 3704(a)(1) and § 3704(a)(3) share similar, if not identical,

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[9] The full text of § 3704(a) is set forth at App. 63a-64a.

structural and syntactic elements. Each exception begins with a clause detailing a broad class of gambling-related activity that is then followed by a second clause – beginning with "to the extent that" – which specifies the type of activity among this broad class that is exempt. As for § 3704(a)(3)'s focus on casinos, the Third Circuit fails to provide any explanation as to why the difference in subject matter should override the structural and syntactic similarities between the two exceptions, especially since both § 3704(a)(1) and § 3704(a)(3) aim to impose some limits on the expansion of gambling in exempted states.

Second, the term "scheme" can fairly be read at a level of generality which permits lotteries that follow the same structure as the prior lotteries but vary as to details, such as the sports league to which they are applied. In this context, that would mean the "scheme" that Delaware conducted was a lottery under State control in which winners of lottery games were affiliated with the outcomes of sporting events. Read this way, Delaware's lotteries fit comfortably within § 3704(a)(1) if they do not fall outside these essential parameters.

The Third Circuit's narrow construction of "scheme" to include only "multi-game parlays involving only NFL teams" is not compelled by the plain language. This Court has recognized that "scheme" is "'hardly a self-defining term.'" *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989). Even the term's contemporaneous dictionary definition broadly states that a "scheme" is a "design or plan formed to accomplish some purpose; a system." *Black's Law Dictionary* 1344 (6th ed. 1990).

2. Given the ambiguity in the reach of § 3704(a)(1), the Third Circuit should have considered PASPA's

legislative history. See, *e.g.*, *O'gilvie* v. *United States*, 519 U.S. 79 (1986). That history confirms that Congress intended to preserve Delaware's right to conduct a state-controlled sports lottery and did not restrict Delaware to the specific sports or rules used to flesh out that scheme in the 1970's. At a minimum, the legislative history – like the statute – is not "unmistakably clear" that Congress intended the narrow reading of the PASPA exception adopted by the Third Circuit.

For example, the Third Circuit expressly held that Delaware retained the power to offer a sports lottery only to the "degree" it had "*actually* conducted" a sports lottery. App. 14a-15a (emphasis omitted). But this re-writes the statute in a manner contrary to Congress' intent. As explained *supra* at 11-12, earlier versions of PASPA included language that limited the exception to activities or schemes that were "*actually* . . . conducted." S. 474 (Feb. 22, 1991); *id.* (Nov. 23, 1991) (emphasis added). Ultimately, however, Congress struck the term "actually," thus broadening the § 3704(a)(1) exception. It enhanced this effect by changing the formulation from the preservation of "the *particular scheme* conducted" to preservation of "the scheme conducted." See *supra* at 11-12. "Where Congress includes limiting language in an earlier version of a bill but deletes its prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. In effect, the Third Circuit imposed a particularity requirement that Congress had rejected.

Likewise, as described *supra* at 9-10, the Senate Judiciary Committee Report and sponsor statements during Senate debate uniformly contradict the Third Circuit's narrow reading of § 3704(a)(1). The Senate Judiciary Committee Report expressly states:

> Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act.

S. Rep. No. 102-248, at 10. See *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'") (alteration omitted) (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

This expansive reading of the exception was repeated by PASPA's floor manager and co-sponsor, Senator DeConcini, when explaining the scope of the exception to his colleagues in the Senate as they began to debate the bill:

> The intent of the legislation is not to interfere with existing laws, operations or revenue streams. Therefore, it provides an exemption for those sports gambling operations which already are permitted under state law.

138 Cong. Rec. at 12973. Because Senator DeConcini was a sponsor and floor manager for the legislation, his "statement[s] to the full Senate carr[y] considerable weight." *Corley* v. *United States*, 129 S. Ct. 1558, 1569 (2009); see also *Babbitt* v. *Sweet Home*

Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

The Third Circuit mischaracterizes this legislative history as constituting "'cherry-picked' snippets [that] offer no consistent insight into Congressional intent." App. 17a n.5. Although the legislators who discussed the PASPA exceptions tended to phrase the breadth of the exception in slightly different ways, that merely underscores the inherent ambiguities in the statute. But more fundamentally, the Third Circuit did not identify any "clear statement" in the legislative history that Congress intended the PASPA exemption to be given the narrow reading adopted by that court. To the contrary, as noted, the most relevant legislative history shows that Congress intended to permit Delaware to conduct a much broader array of gambling activities.[10] Far from "cherry picking," Delaware cites statements made by the formal report of the Senate Judiciary Committee and a sponsor and floor manager of the Senate bill.

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[10] The Third Circuit discusses only the Senate Report. It notes that, after explaining that the § 3704(a)(1) exception was "'not intended to prevent . . . Delaware from expanding [its] sports betting schemes into other sports as long as it was authorized by State law,'" App. 17a n.5 (omission in original), the Senate Report states that the exception "'does not intend to allow the expansion of sports lotteries into head-to-head betting.'" *Id.* The latter statement suggests a narrower reading of the exception than that advanced by Delaware; but, relevant here, it also supports a much broader reading of § 3704(a)(1) than given by the Third Circuit. The court's decision to ignore the history was the result of its erroneous application of *Gregory* and its conclusion that PASPA's language is plain.

II. THE THIRD CIRCUIT ERRED BY DECIDING THE MERITS OF THE CASE ON REVIEW OF A PRELIMINARY INJUNCTION.

On appeal from the denial of a preliminary injunction, see 28 U.S.C. § 1292(a), the Third Circuit invalidated Delaware's sports lotteries and announced sweeping prohibitions on the State's future sports lotteries (*viz.*, no games involving sports other than NFL football and no single-game lotteries, App. 20a). The Sports Leagues did not ask the appellate court for this relief, and neither this Court nor any other court of appeals would have taken this extraordinary step in similar circumstances.

"[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395. This Court has made clear that it should be done only where "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh*, 476 U.S. at 757.

Here, the court of appeals asserted that there was no dispute about what sports-lottery games Delaware had conducted in the past or what games Delaware proposed to conduct in the present, and therefore that there were no material factual disputes at all. App. 11a-12a. But, the court itself stated that PASPA does *not* "require[] Delaware's sports lottery to be identical in every respect to what the State conducted in 1976," and that only "substantive changes" were precluded. *Id.* at 19a. That determination should have led it inexorably to the conclusion that there are material disputes of fact about what differences between the 1970's lottery and the current lottery are *substantive*.

Those are not legal questions that can be decided by judges without factual development.

The Third Circuit, however, believed that it could determine as a matter of law what differences between schemes are substantive, apparently based on its own knowledge of sports and sports gambling. But questions about the substantiality of differences are not legal questions. These questions are inherently factual, requiring evidence from persons with expertise in lottery games and sports gambling.

For example, Delaware would have offered evidence that certain changes were not substantive, such as (i) conducting the same lottery game formerly using a slate of NFL games with a slate of MLB or NHL games, or (ii) conducting single- or double-game lotteries instead of three-game lotteries. Delaware was prepared to offer expert testimony about the differences among types of lottery games and whether those differences were substantive. See *supra* at 17.

Once one acknowledges that it would be absurd to confine Delaware to the precise games offered in the 1970's, as the Third Circuit did, see App. 19a, then plainly, there are factual disputes about how much difference is truly substantive. These factual disputes are significant. For example, if Delaware can show that using a slate of MLB games on a Tuesday does not substantively change a lottery game involving a slate of NFL games on a Sunday, it may be able to conduct games year-round, making the lottery substantially more efficient and profitable for the State.

Moreover, this appeal arose from district court proceedings that exemplify the limitations inherent in emergency proceedings. Plaintiffs filed their complaint on July 24, 2009 and motion for a

preliminary injunction on July 28, 2009, with the lottery games scheduled to begin in early September. An initial conference was set the next day giving the State the opportunity only to oppose the motion orally. Although the district court heard limited argument on the motion, the focus was on irreparable harm. AA 240, 247-50, 265-66. The court directed that the parties to "meet-and-confer" about how the case should proceed in advance of another scheduling conference to be held August 5, 2009. *Id.* at 267.

During that period, Delaware sought to provide the court with answers to questions raised at the hearing about the impact that a preliminary injunction would have on Delaware's lottery revenues. AA 317-30. In contrast, the Sports Leagues filed a 10-page single spaced "letter" seeking resolution of the matter on an expedited summary judgment motion and without discovery. *Id.* at 276-77.

At the August 5 status conference, the court denied the Sports Leagues' motion. App. 40a. The court recognized that the State had not taken discovery on "what, if anything, the State actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Id.* at 42a; see also *id.* at 46a. And while the trial court set a discovery schedule to permit factual development, the Third Circuit stopped that process dead in its tracks by *sua sponte* deciding the merits.

Accordingly, the State "had the benefit neither of a full opportunity to present [its] case[] nor . . . a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U.S. at 396. And, because the court *denied* the preliminary injunction without any written submission from the State, the record that went to the Third Circuit did not even

include the legal arguments and factual evidence that the State would have submitted in opposition to plaintiffs' motion. The appellate court's *sua sponte* merits decision was fundamentally unfair to the State.

This case is a poster child for the proposition that federal appeals courts should rarely convert a preliminary-injunction appeal to a merits appeal. It was too easy for the Third Circuit to brush past factual disputes that seem commonsensical only because the record is wholly undeveloped. The Third Circuit's decision of the merits here conflicts with this Court's decisions and those of other circuits which refuse to conduct merits review of appeals arising from preliminary injunction orders without absolute certainty that no relevant factual disputes exist. See, *e.g.*, *Siegel* v. *LePore*, 234 F.3d 1163, 1171 n.4 (11th Cir. 2000) (en banc) (per curiam) ("Mere expediency does not warrant this Court reaching the merits of Plaintiffs' claims [on appeal from a preliminary injunction ruling] in the absence of the necessary evidence by which to do so"); *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1421-22 (9th Cir. 1984) ("The case is in the early stages of discovery; the record is not well developed. This Court will not attempt now to decide conclusively the merits of the case."); *W. Va. Ass'n of Cmty. Health Ctrs., Inc.* v. *Heckler*, 734 F.2d 1570, 1579 (D.C. Cir. 1984).

* * * *

The Third Circuit's decision finally resolves the scope of Delaware's authority and deprives Delaware of the right to exercise an historic revenue-raising power that Congress preserved for it – and does so in a truncated and fundamentally unfair proceeding. Cf. *Heckler* v. *Redbud Hosp. Dist.*, 473 U.S. 1308,

1314 (1985) (Rehnquist, J., in chambers) (staying preliminary injunction requiring agency to promulgate regulations, and stating "the District Court has inappropriately used its 'preliminary injunction' as a vehicle for final relief on the merits"). Only this Court's review can prevent Delaware from being permanently deprived of a sovereign right through the vehicle of an inequitable proceeding.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 27, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.

JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

Argued Aug. 24, 2009.
Filed Aug. 31, 2009

Before McKEE, FUENTES and HARDIMAN, *Circuit Judges*.

OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

In this interlocutory appeal we review an order of the United States District Court for the District of Delaware denying a motion for preliminary injunction filed by the National Football League, the National Basketball Association, the National Hockey League,

the Office of the Commissioner of Baseball, and the National Collegiate Athletic Association (collectively, Leagues). The Leagues sought to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act (Act), Del. Laws Ch. 28 (H.B. No. 100) (2009), 29 Del.Code § 4801 *et seq.*, on September 1, 2009. As we shall explain, we need not decide whether the District Court's denial of the Leagues' preliminary injunction was proper because we hold as a matter of law that elements of Delaware's sports lottery violate federal law.

I.

In March 2009, the Governor of Delaware, Jack Markell, proposed legislation authorizing sports betting and table gaming at existing and future facilities in Delaware. On March 19, Governor Markell sought an advisory opinion from the Delaware Supreme Court pursuant to 10 Del.Code § 141 and 29 Del.Code § 2102, regarding the constitutionality of his proposal under the Delaware Constitution. In a letter to the Delaware Supreme Court, Governor Markell described three types of proposed sports gambling: (1) point-spread bets on individual games; (2) over/under bets on individual games; and (3) multi-game parlay bets.[1] On May 14—while the request for an advisory opinion

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[1] Under regulations proposed pursuant to the Act, Delaware intends to offer three games: Single Game Lottery, Total Lottery, and Parlay Lottery. In Single Game Lottery, bettors must select the winning team in a single sports contest against a point spread. In Total Lottery, the bettor gambles on whether the total number of points scored by both teams in a single contest will be over or under a specified sum. The final game, Parlay Lottery, combines elements of the first two games in asking bettors to correctly choose the winners of two or more sports contests, or two or more over/under bets, or some combination of winners and over/under bets.

from the Delaware Supreme Court was pending—Governor Markell signed the Act into law. *In re Request of Governor for an Advisory Opinion (In re Request of Governor)*, —A.2d—, No. 150, 2009, 2009 WL 1475736, at *2 (Del. May 27, 2009).

After hearing oral argument, the Delaware Supreme Court issued an opinion on May 29, which found that multi-game betting would not violate state law. In analyzing the legality of the Act and the "lotteries" proposed pursuant to the Act, the Delaware Supreme Court relied heavily on Judge Stapleton's decision in *National Football League v. Governor of the State of Delaware (NFL)*, 435 F.Supp. 1372 (D.Del.1977). That case concerned the NFL's challenge to a sports betting scheme known as "Scoreboard" that Delaware conducted during the 1976 season. Scoreboard was comprised of three games: Football Bonus, Touchdown, and Touchdown II. In Football Bonus, the State offered two pools of seven NFL games each and bettors had to predict the winners—without a point spread—in one or both of the pools. In Touchdown, bettors selected both the winners and point spreads for either three, four, or five NFL games. Finally, Touchdown II—which replaced Touchdown midway through the season—required bettors to pick the winners, against the point spread, for between four and twelve NFL games. All of the Scoreboard games conducted in 1976 were confined to betting on the NFL, and all required that the bettor wager on more than one game at a time.

In *NFL*, Judge Stapleton held such wagering was permissible under the Delaware Constitution because chance is the "dominant factor" in multi-game (parlay) betting. The Delaware Supreme Court reached the same conclusion in its advisory opinion, *In re Request of Governor*, 2009 WL 1475736, at *8, but did

not decide the constitutionality of single-game betting, except to recognize that it differs from the parlay games addressed by Judge Stapleton. *Id.* The Delaware Supreme Court did not address the federal statutory question presented in this appeal.

Following receipt of the Delaware Supreme Court's advisory opinion, on June 30 the State published its proposed regulations to implement the Act (Regulations). According to the Regulations, Delaware intends to implement a sports betting scheme that would include wagers "in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team." A168. Delaware's proposed sports betting scheme includes single-game betting in addition to multi-game (parlay) betting, as the Regulations define the term "maximum wager limit" to include "the maximum amount that can be wagered on a *single sports lottery wager be it head-to-head or parlay*. . . . " A168 (Regulations § 2.0, definition of "maximum wager limit") (emphasis added).

Delaware intends to commence its sports betting scheme on September 1, 2009, in time for the start of the upcoming NFL regular season. Though the NFL is its focus, Delaware intends to conduct—and the Regulations sanction—betting on all major professional and college sports.

II.

On July 24, the Leagues filed a complaint against Governor Markell and Wayne Lemons, the Director of the Delaware State Lottery Office (collectively, Delaware or State), claiming that elements of Dela-

ware's proposed sports betting scheme violate the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701, *et seq.*[2] Although PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also "grandfathered" gambling schemes in individual states "to the extent that the scheme was conducted by that State" between 1976 and 1990.

Four days after filing their complaint, the Leagues filed a motion for preliminary injunction, requesting that the District Court enjoin the State "from commencing, instituting, operating and maintaining a proposed 'sports lottery' to the extent that such lottery permits (i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976" pending final adjudication of the Leagues' action.

The District Court held a scheduling conference on July 29 at which it urged the parties to reach an agreement by which the State would "stand down" pending an expedited adjudication of the merits. A268. The parties could not reach such an agreement, however, so the District Court asked for written submissions and held a conference on August 5. Following the conference, the court orally denied the Leagues' motion and scheduled a trial for December 7. On August 10, the District Court issued a 13-paragraph memorandum order explaining its reasons for denying the injunction.

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[2] The PASPA claim was brought at Count I. The Leagues also brought a claim under state law at Count II, which alleged that the sports betting scheme violates Section 17 of the Delaware Constitution because it does not constitute a permissible "lottery." The state-law claim is not at issue in this appeal.

In its memorandum order, the District Court found that the Leagues had not shown a likelihood of success on the merits. *Office of Comm'r of Baseball v. Markell*, 2009 WL 2450284, at *1 (D.Del. Aug. 10, 2009). Noting that "both sides vigorously and ably contend that they are entitled to win on the merits," the District Court stated: "On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Id.* at *2. The District Court also noted that the Leagues suggested in their letter brief that the court treat their motion for preliminary injunction as a motion for summary judgment and questioned whether the Leagues had demonstrated both the requisite irreparable harm and that the balance of the equities fell in their favor. *See id.* at *2-4.

On August 7—prior to receipt of the District Court's memorandum opinion—the Leagues filed their notice of appeal. Three days later, the Leagues filed a motion to expedite their appeal and their opening brief. On August 12, Delaware filed a motion to dismiss the appeal and its opposition to the Leagues' motion to expedite. On August 13, we granted the Leagues' motion to expedite, issued a briefing schedule, and set oral argument for August 24.

It is often noted that the wheels of justice move slowly—and for good reason. As the procedural history of this case demonstrates, however, that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented

to us, prudence dictates that we answer that question with dispatch.

III.

We begin, as always, by considering whether we have jurisdiction to hear this appeal. The Leagues claim we have jurisdiction under 28 U.S.C. § 1292(a), which provides: "courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing*, or dissolving injunctions." (emphasis added). The State disagrees, arguing that we must apply the test set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), which requires the Leagues to show that the District Court's denial of the motion for preliminary injunction (1) will have a serious, perhaps irreparable, consequence; and (2) can be effectively challenged only by immediate appeal. *Id.* at 83, 101 S.Ct. 993; *see also Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370, 379, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987).

In arguing that the Leagues must establish the *Carson* factors, Delaware relies on dicta from some of our prior cases stating that both orders expressly denying injunctions and orders having the practical effect of denying injunctions must meet the two-prong *Carson* test. *See Vuitton v. White*, 945 F.2d 569, 574 (3d Cir.1991); *Ross v. Zavarella*, 916 F.2d 898, 902 (3d Cir.1990). But none of the cases upon which Delaware relies involved *express denials* of injunctive relief; rather, they dealt with orders that were alleged to have the *practical effect* of denying injunctive relief. Accordingly, the Leagues need not demonstrate that the order will have a "serious, perhaps irreparable, consequence" and can be "effectively challenged" only by immediate appeal. *See*

Cohen v. Bd. of Trs. of Univ. of Med., 867 F.2d 1455, 1464 (3d Cir.1989). The language of § 1292(a)(1) is clear and the Leagues need not satisfy any jurisdictional hurdle beyond the fact that they have appealed from an order refusing to enter an injunction.

We next turn to the scope of our review under 28 U.S.C. § 1292(a). We have adopted a broad view of appellate jurisdiction under this section. *See Kershner v. Mazurkiewicz*, 670 F.2d 440, 445 (3d Cir.1982); *see also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3921.1, at 28 (2d ed. 1996) ("Jurisdiction of the interlocutory appeal [under § 1292(a)(1)] is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development."). Moreover, we have held that "[w]hen an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106."[3] *United Parcel Serv., Inc. v. U.S. Postal Serv.*, 615 F.2d 102, 107 (3d Cir.1980). Accordingly, we have broad authority to decide this case as appropriate under § 2106.

Having determined that we have authority to address all aspects of this case, we must determine whether it is proper to exercise that authority. "As a general rule, when an appeal is taken from the grant

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[3] Section 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal." *Callaway v. Block*, 763 F.2d 1283, 1287 n. 6 (11th Cir.1985). This ordinarily requires that we review the decision to grant or deny a preliminary injunction for abuse of discretion, employing the standard four-factor test. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir.1999). Nevertheless, the Supreme Court has held the "general rule" of limited review is one of "orderly judicial administration, not a limit on judicial power." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled on other grounds by Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

In *Thornburgh*, the Supreme Court considered whether this Court properly exercised its jurisdiction in striking down portions of a Pennsylvania statute following an appeal from the district court's partial denial of a preliminary injunction. *See id.* at 755-57, 106 S.Ct. 2169. The Supreme Court acknowledged that review of a preliminary injunction is normally limited to the injunction itself, but explained: "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id.* At the same time, the Supreme Court cautioned: "A different situation is presented . . . when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial." *Id.* at 757 n. 8, 106 S.Ct. 2169. In affirming this Court's decision to address the merits of the plaintiff's case, the Supreme Court quoted from our opinion:

> Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.

Id. at 757, 106 S.Ct. 2169 (quoting *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 290 (3d Cir.1984)).

The approach taken in *Thornburgh* has been embraced by a number of our sister courts of appeals. In an appeal from the grant of a preliminary injunction in *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir.2000), the Court of Appeals for the Eighth Circuit exercised its discretion to reach the merits of the underlying dispute, determining that it was "faced with a purely legal issue on a fixed . . . record." *Id.* at 1186-87. The court explained: "[t]he considerations that caution against a broad scope of review in the usual interlocutory appeal—that is, a tentative and provisional record with conflicting material facts—simply are not present here." *Id.* at 1187. Likewise, in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir.2005), the Court of Appeals for the Eleventh Circuit assessed the merits of the plaintiff's First Amendment claim on appeal after the district court denied his request for a preliminary injunction. Finding that the facts of the case were "simple and straightforward, and the record need[ed] no explanation," *id.* at 1274, the court explained that "we do not think it necessary or prudent to confine our opinion to holding that [the plaintiff] has shown a *likelihood* of success on the

merits, when it is altogether clear that [the plaintiff] *will* succeed on the merits of its First Amendment claims," *id.* at 1272 (emphasis in original). Finally, in *Doe v. Sundquist*, 106 F.3d 702 (6th Cir.1997), the Court of Appeals for the Sixth Circuit considered the merits of the plaintiffs' claim following a denial of their preliminary injunction motion. The court noted that "[i]f an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation," consideration of that issue is proper. *Id.* at 707 (internal quotation marks and citation omitted). The court explained that "[t]he sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy." *Id.* (citation omitted).

In light of *Thornburgh* and its progeny, we must determine whether the record in this appeal presents "a pure question of law" that is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief," *United Parcel Serv.*, 615 F.2d at 107, or whether the Leagues' "probability of success on the merits depends on facts that are likely to emerge at trial," *Thornburgh*, 476 U.S. at 757 n. 8, 106 S.Ct. 2169. For the reasons that follow, we conclude that this case falls into the former category.

In denying the Leagues' motion for preliminary injunction, the District Court hypothesized that "there *may* exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Markell*, 2009 WL 2450284, at *2 (emphasis added). Contrary to the District Court's

supposition, we have reviewed the record and cannot find any material issues of fact in dispute. As the Leagues rightly argue, Judge Stapleton's opinion in *NFL* is the definitive word regarding the scope and extent of Delaware's gambling scheme as it was conducted in 1976; the State neither challenged Judge Stapleton's findings 33 years ago nor does so now. Likewise, the parties do not dispute the scope and extent of the sports gambling scheme that Delaware intends to implement on September 1. As counsel for Delaware properly and candidly conceded at oral argument, the State intends to conduct widespread betting on both professional and college sports beyond the scope of the football-only parlays permitted in 1976. In sum, the parties agree upon what Delaware did in 1976 and what Delaware intends to do now. Given the absence of any disputed issue of material fact—as confirmed by both parties at oral argument—we conclude that this case does not turn on a "legal issue that might be seen in any different light after final hearing," *United Parcel Serv.*, 615 F.2d at 107, and is ripe for adjudication as a matter of law. Therefore, we will proceed to assess the merits of the Leagues' claim that Delaware's sports betting scheme violates PASPA.[4]

IV.

We begin our legal analysis with the statutory language. PASPA prohibits any person or governmental entity from sponsoring, operating, advertising or promoting:

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[4] Because we reach the merits of this case, we need not consider the parties' arguments regarding irreparable harm and the balancing of the equities.

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The statute contains four exceptions, only one of which is relevant here. That exception provides that PASPA's general prohibition against sports betting shall not apply to: "lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, ***to the extent that the scheme was conducted by that State*** or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a) (emphasis added).

Not surprisingly, the parties view PASPA's language differently, with both sides claiming that the plain language requires a favorable result on the merits.

A.

Delaware contends that its sports betting scheme qualifies for the exception in § 3704(a)(1), claiming: "[t]he plain language of the pertinent PASPA exemption allows Delaware to reintroduce a sports lottery under State control because Delaware conducted such a scheme at some time between January 1, 1976, and August 31, 1990." Del. Br. at 3. The State also contends that the exemption "is broad in scope, and nowhere states that it restricts Delaware to operating particular lottery games for a particular sport." *Id.* at 32. In Delaware's view, § 3704(a)(1) allows it to conduct any "sports lottery under State control," *id.*, because it did

so in 1976. Although the State acknowledges, as it must, that the exception permits its lottery only "to the extent that the scheme was conducted," it argues that the word "scheme" refers neither to the three particular games it offered in 1976, nor to parlay betting in general, nor even to wagering on NFL games, but to a "sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events." *Id.* at 33.

Even assuming that Delaware's interpretation of the word "scheme" were persuasive, we must reconcile that interpretation with the statutory language "*to the extent* that the scheme *was conducted* by that State." (emphasis added). The State claims that this phrase merely "identifies a condition (*i.e.*, that a State must have conducted a sports lottery in the past in order to be permitted to operate a sports lottery in the future)," *id.* at 34, rather than limiting the State's gaming authority to either the particular sports or types of games previously offered. Delaware argues that because state law previously *authorized* a broad lottery encompassing many types of games and many sports, it may now *institute* a broad lottery with those features.

In contrast to Delaware's argument, the Leagues contend that the exception in § 3704(a)(1) applies only to lotteries or other schemes "to the extent" that such lottery or scheme "was conducted" by the State between January 1, 1976 and August 31, 1990. The Leagues insist that it is not sufficient that a particular lottery may have been contemplated, or even authorized, but rather we must consider the specific means by which the lottery was *actually conducted.*

We agree with the Leagues' interpretation. As the exception found at § 3704(a)(2) makes clear, there is

a distinction between wagering schemes that were merely "authorized" and those that were "conducted." *See* 28 U.S.C. § 3704(a)(2) (which applies to a wagering scheme that was both (i) "authorized by a statute as in effect on October 2, 1991," and (ii) "actually was conducted during the period beginning September 1, 1989 and ending on October 2, 1991"). Whatever the breadth of the lottery authorized by Delaware state law in 1976, PASPA requires us to determine "the extent"—or degree—to which such lottery *was conducted*. We cannot hold—as the State impliedly suggests—that Congress meant to conflate "authorized" and "conducted." *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) ("It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."); *Alaka v. Attorney General*, 456 F.3d 88, 97-98 (3d Cir.2006) ("It is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply."). Thus, the sole exception upon which Delaware relies—applicable to wagering schemes dating back to 1976—applies only to schemes that were "conducted." 28 U.S.C. § 3704(a)(1).

While minimizing the importance of the language of § 3704(a)(2), Delaware asks us to draw parallels to § 3704(a)(3), which provides:

> a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only *to the extent* that—(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this

> chapter, to be operated in that municipality; and (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive State regulation authorized by that State's constitution and applicable solely to such municipality[.]

(emphasis added). Delaware argues that the phrase "to the extent" must mean the same thing in § 3704 (a)(1) as it does in § 3704(a)(3), where the phrase identifies a condition. We reject this argument out of hand because the exception contained in § 3704 (a)(3)—which deals with casinos—differs in subject matter, structure, and syntax from the language of § 3704(a)(1).

As a fallback position, Delaware argues that PASPA is ambiguous such that resort to legislative history is necessary. We disagree, because as we have noted:

> A statutory provision is not ambiguous simply because by itself, [it is] susceptible to differing constructions because in addition to the statutory language . . . itself, we take account of the specific context in which that language is used, and the broader context of the statute as a whole. We assume, for example, that every word in a statute has meaning and avoid interpreting one part of a statute in a manner that renders another part superfluous.

Disabled in Action v. SEPTA, 539 F.3d 199, 210 (3d Cir.2008) (internal quotations and citations omitted). Applying these principles of statutory construction, we find unambiguous the phrase "to the extent that the scheme was conducted by that State," so our "inquiry comes to an end." *Kaufman v. Allstate N.J.*

Ins. Co., 561 F.3d 144, 155 (3d Cir.2009) (citation omitted).[5]

Because we do not find PASPA ambiguous, we find unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("[A]bsent an unmistakably clear expression to

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[5] Delaware spends several pages of its brief explaining the legislative history and citing statements from various legislators. These statements are inconclusive at best. When we view them in their entirety rather than focusing on "cherry-picked" snippets, they offer no consistent insight into Congressional intent. For example, the Senate Report upon which Delaware relies, Del. Br. at 13, states that the exemption in § 3704(1) "is not intended to prevent . . . Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law . . . . At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting . . . . " A152 (Senate Report). This excerpt from the Senate Report is unhelpful in two respects. First, it is at odds with PASPA's statutory language. Second, it contradicts Delaware's claim that single-game wagering is permitted. Similarly unhelpful are the many statements of individual legislators cited by Delaware because such "cherry-picked" statements cannot be deemed to reflect the views of other legislators, much less of a majority of those who enacted the statute. *Szehinskyj v. Attorney General*, 432 F.3d 253, 256, (3d Cir.2005) ("[Appellant's] selective invocation of fragments of the floor debate is an object lesson in the perils of appealing to this particular kind of legislative history as a guide to statutory meaning. This case is a perfect illustration of the well-known admonition that what individual legislators say a statute will do, and what the language of the statute provides, may be far apart indeed. The law is what Congress enacts, not what its members say on the floor."). In sum, we conclude that "[t]he legislative history is more conflicting than the text is ambiguous," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 70 S.Ct. 445, 94 L.Ed. 616 (1950), and does not support the State's position.

alter the usual constitutional balance between the States and the Federal Government, [federal courts] will interpret a statute to preserve rather than destroy the States' substantial sovereign powers.") (internal quotations omitted). PASPA unmistakably prohibits state-sponsored gambling, 28 U.S.C. § 3702, subject to certain exceptions, 28 U.S.C. § 3704. Through PASPA, Congress has "altered the usual constitutional balance" with respect to sports wagering, although Delaware retains the right to implement a sports wagering scheme "to the extent that the scheme was conducted" previously. Those words of limitation are not rendered nugatory by generalized notions of "state sovereignty."

Finally, Delaware argues that we cannot construe the language "to the extent that the scheme was conducted" so narrowly because doing so would render the PASPA exception a nullity. Certain aspects of Scoreboard were deemed impermissible by either Judge Stapleton, *NFL*, 435 F.Supp. at 1387-88 (holding that Touchdown II violated the lottery provision of the Delaware Constitution by utilizing a fixed-payoff scheme), or the Delaware Supreme Court, *Op. of the Justices*, 385 A.2d 695, 705 (Del.1978) (striking down Football Bonus and Touchdown because they awarded prizes on a pari-mutuel basis in violation of the State's Constitution). Consequently, the State reasons that if it is confined to the exact scheme conducted in 1976, the exception would be illusory as applied to Delaware. The State argues that Congress could not have intended this result, especially when the legislative history makes clear that Delaware was one of only four states that were intended beneficiaries of the exception. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)

(courts should disfavor interpretations of statutes that render language superfluous).

Delaware's reading overstates the narrowness of the exception provided by § 3704(a)(1). We do not hold that PASPA requires Delaware's sports lottery to be identical in every respect to what the State conducted in 1976. Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period. For example, as the State aptly noted—and the Leagues conceded—at oral argument, "to the extent the scheme was conducted" cannot mean that Delaware could institute a sports betting scheme for only four months as was done in 1976. Likewise, Delaware is neither limited to selling tickets at identical venues nor prohibited from allowing wagering on NFL teams that did not exist in 1976. Such *de minimis* alterations neither violate PASPA's language nor do violence to its central purposes, *viz.*, to limit the spread of state-sponsored sports gambling and maintain the integrity of sports. By contrast, expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling—namely single-game betting—beyond "the extent" of what Delaware "conducted" in 1976 would engender the very ills that PASPA sought to combat. In construing statutes, we consider the statute's overall object and policy, and avoid constructions that produce "odd" or "absurd" results or that are "inconsistent with common sense." *Disabled in Action*, 539 F.3d at 210 (internal citations omitted).

B.

In light of our reading of PASPA, we determine what scheme Delaware may conduct in 2009 with reference

to the scheme it conducted in 1976. As Judge Stapleton held in *NFL*—and as was not disputed in the proceedings before either the District Court or our Court in this matter—the only sports betting scheme "conducted" by Delaware in 1976 involved the three Scoreboard games. That betting scheme was limited to multi-game parlays involving only NFL teams. Thus, any effort by Delaware to allow wagering on athletic contests involving sports beyond the NFL would violate PASPA. It is also undisputed that no single-game betting was "conducted" by Delaware in 1976, or at any other time during the time period that triggers the PASPA exception. *See NFL*, 435 F.Supp. at 1385 ("None of the [1976] games permits head-to-head or single game betting."). Because single-game betting was not "conducted" by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in § 3704(a)(1) of PASPA and thus prohibited under the statute's plain language.

Under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976. Of course, we express no opinion regarding the legality of such a scheme under Delaware statutory or constitutional law.

For the foregoing reasons, we will vacate the order of the District Court and remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. DELAWARE

C.A. No. 09-538 (GMS)

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, the NATIONAL BASKETBALL ASSOCIATION, a joint venture, the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, the NATIONAL FOOTBALL LEAGUE, an unincorporated association, and the NATIONAL HOCKEY LEAGUE, an unincorporated association,

Plaintiffs,

v.

JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director of the Delaware State Lottery Office,

Defendants.

Aug. 10, 2009.

MEMORANDUM ORDER

GREGORY M. SLEET, *Chief Judge*.

1. On July 24, 2009, the plaintiffs filed the complaint in this action alleging, among other things, that the Delaware Sports Lottery Act (the "Act"), 29 Del. C. § 4825, and the regulations proposed pursuant to the Act violate the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et*

seq. and the Delaware Constitution, Del. Const. art. II, § 17. (D.I.1.)

2. On July 28, 2009, pursuant to Fed.R.Civ.P. 65(a), the plaintiffs filed a motion for a preliminary injunction seeking to enjoin the defendants from commencing any "sports lottery" that permits: "(i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." (D.I.8.)

3. In the exercise of its discretion, the court has considered the applicable law, and carefully reviewed: (1) the pleadings filed thus far in this matter (D.I.1); (2) the federal statute at issue; (3) the plaintiffs' motion for preliminary injunction (D.I.8); (4) the plaintiffs' opening brief and attachments in support of their motion for preliminary injunction (D.I.9-12); (5) the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced, letter brief (D.I.14), and the defendants' three-page, single-spaced, letter brief filed on August 3, 2009 (D.I.15), as well as the defendants' four affidavits filed on August 4, 2009 (D.I.17).

4. The court has also considered the arguments of counsel for the parties during a one-hour teleconference in this matter conducted on July 29, 2009 (D.I.13). After giving due consideration to all of these things, the court concludes that a preliminary injunction is not warranted in this case. The court will, therefore, deny the plaintiffs' motion.

5. With good reason, federal courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that a "preliminary injunction is an extraordinary remedy

that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest." *NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir.1999) (citation omitted). "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir.1990) ("Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.")

6. First, based on the record as it stands, the court is not convinced that the plaintiffs will "likely succeed on the merits" in this case. *NutraSweet*, 176 F.3d at 153. In fact, both sides vigorously and ably contend that they are entitled to win on the merits. Indeed, the plaintiffs propose, despite the nascent nature of this action, that the court and the parties go straight into the summary judgment phase of the litigation. Specifically, at page 2 of their August 3, 2009 letter brief, the plaintiffs "ask the Court [ ] to treat plaintiffs' motion [for injunctive relief] as one for summary judgment." (D.I.14 at 2.) In addition, at page 7 of their letter brief, the plaintiffs write; "plaintiffs respectfully request that the Court treat their motion for a preliminary injunction as one for summary judgment on Count I of the Complaint, alleging violation of [the Professional and Amateur Sports Protection Act] PASPA." (*Id.* at 7.) Indeed, the plaintiffs propose, "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in sup-

port of their motion for a preliminary injunction and their letter brief of August 3. (*Id.*)

7. In this matter, as whenever a party invokes the authority of the court, the ends of justice dictate a judge, where possible, proceed with deliberation and caution—especially when a party seeks extraordinary relief of the type at issue here. On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the court cannot say that the plaintiffs will likely succeed on the merits.

8. Second, the court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the court granting preliminary injunctive relief. In enacting the federal legislation at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Fed.R.Civ.P. 65(a), and considering the language of the actual statute at issue, these findings do not mandate or require under all circumstances that this court grant preliminary injunctive relief. In other words, this court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or *per se* establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the court consider

this factor along with and in the context of each of the factors courts traditionally consider when confronted with a request for a preliminary injunction. *See NutraSweet*, 176 F.3d at 153; *see also Opticians Ass'n*, 920 F.2d at 192 ("[w]hen ruling on such a motion, the district court must consider four factors").

9. In addition, it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished judge of this court and now the Third Circuit Court of Appeals, Judge Walter K. Stapleton, wrote the following:

> I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, *per se*, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score . . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs, or their reputation.

Nat'l Football League v. Governor of the State of Delaware, 435 F.Supp. 1372, 1378 (D.Del.1977).

10. Today, the court sees some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA, and that another 16 years have elapsed since the passage of that Act and the reappearance of the NFL, along with other parties plaintiff, before this court making similar claims to being in imminent danger of having their reputations and good will compromised because of yet another attempt by Delaware to engage in gambling activity associated with professional football and other sports. The irony is this: during the course of the court's discussion with counsel on July 29, 2009, counsel for the defendants made some, apparently fact based assertions which, while certainly not the equivalent of evidence based findings of a court or the Congress of the United States, are, at least relevant to the court's consideration of the issue of irreparable harm when asked to grant a request for preliminary injunctive relief. Counsel observed:

> For example, the New York Times reported two years ago that the Motorcity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA, the Sacramento Kings [are] owned by the same people who own the Palms Casino in Las Vegas . . . The Chairman and CEO of Harrah's owns a stake in the Celtics [that would be the Boston Celtics] . . . There [are] plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting

> lines, injury reports . . . advice on which side of a bet to be on . . . Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets . . . The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angels, the Dodgers, the Marlins and the Cubs [all MLB baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries . . . The NHL hosted its 2009 Player Awards in the Palms Casino.

(D.I.13 at 21-22.)

11. Clearly, circumstances have changed materially since Judge Stapleton issued his ruling in 1977, that is, the Congress has enacted PASPA. This court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left in tact the ability of judicial officers to apply well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enactments of Congress which, upon the judgment or finding of a named party or official, seem to require the court do a thing such as issue an injunction, *e.g.*, the Emergency Price Control Act of 1942[1] which provides that an injunc-

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[1] 50 U.S.C. Appx. § 901 *et seq.* (repealed 1956).

tion "*shall* be granted without bond," PASPA, under the sub-heading "Injunctions" provides: "A civil action to enjoin a violation of section 3702 *may* be commenced in an appropriate district court of the United States." 28 U.S.C. § 3703. Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.

12. Third, the court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the court also cannot say that granting an injunction in this case is in the public interest. In fact, given that the defendants claim they intend to use monies raised from the activities at issue in this case to balance the State's budget, the converse may very well be true. At this juncture in the proceedings, the court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.

13. In considering and balancing the preliminary injunction factors, and in light of the present record, at this early stage of the case, the court concludes that a preliminary injunction is not appropriate. Therefore, IT IS HEREBY ORDERED that the plaintiffs' motion for preliminary injunction (D.I.8) is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

[Filed: 08/10/2009]

Civil Action
No. 08-538-GMS

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, THE NATIONAL BASKETBALL ASSOCIATION, a joint venture, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, and THE NATIONAL HOCKEY LEAGUE, an unincorporated association,

Plaintiffs,

v.

JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director of the Delaware State Lottery Office,

Defendants.

Wilmington, Delaware
Wednesday, August 5, 2009
2:00 p.m.
Conference

BEFORE: HONORABLE GREGORY M. SLEET, *Chief Judge*

APPEARANCES:

KENNETH J. NACHBAR, ESQ.,
SUSAN W. WAESCO, ESQ., and
PAULETTA J. BROWN, ESQ., and

MEGAN WARD CASCIO, ESQ.
Morris, Nichols, Arsht & Tunnel LLP
Counsel for Plaintiffs

[2] APPEARANCES CONTINUED:

DAVID A. MARGULES, ESQ.,
ANDRE G. BOUCHARD, ESQ.,
JOEL FRIEDLANDER, ESQ., and
JAMES J. MERKINS, JR., ESQ.
Bouchard Margules & Friedlander P.A.
Counsel for Defendants

MICHAEL A. BARLOW, ESQ.
Counsel for Defendant Markell

(The following took place in chambers.)

THE COURT: Let's have identifications for the record.

MR. NACHBAR: Ken Nachbar.

MS. WAESCO: Susan Waesco.

MS. CASCIO: Megan Cascio.

MS. BROWN: Pauletta Brown.

MR. MARGULES: David Margules for the defendants.

MR. BOUCHARD: Any Bouchard for the defendants.

MR. FRIEDLANDER: Joel Friedlander for the defendants.

MR. MERKINS: James Merkins, defendants.

MR. BARLOW: Michael Barlow for the defendants.

(There followed an off-the-record discussion.)

[3] (The following took place in open court, beginning at approximately 3:05 p.m.)

THE COURT: Please, keep year seats, counsel. This is a continuation of our office conference that we started back in my chambers. As such, it is not a formal session of Court. Counsel are free to, in addressing the Court, remain seated, if you wish. Whatever your comfort level is.

I understand that lawyers are used to standing, that is fine, but you can certainly sit.

So I gather that those discussions, those further discussions, were not fruitful. Is that fair or is there something you want to report to me that will make me smile?

MR. MARGULES: I guess it all depends on what makes Your Honor smile.

We would be prepared to have the Court dismiss the case and Your Honor can do whatever you want. That would make you smile.

We have talked further and our concern is—we have expressed some of our concerns to the Court in letters and also in the conference. There is, I think, something like two—there is two or one and a half motions on the table, an injunction motion and a summary judgment motion in some nascent state. And also we have a proposal from the [4] State for a quick trial.

Our preference remains to have a quick trial. And, as we said, with the discovery that is needed, we can do that any time that works for the Court after January 1st. We do not believe that the plaintiffs have demonstrated entitlement to an injunction. But we do want to stress to the Court that they now

submitted full briefing on an injunction and more than full briefing on a summary judgment motion.

We, trying to be consistent with the Court's guidelines on what's appropriate submission, have really not had an opportunity to make a submission to the Court on the merits of anything. And if the Court is inclined to deal with one or both of the plaintiffs' motions, or otherwise enter some kind of an interim order, we would respectfully request that we have an opportunity to submit full briefing before the Court if it does so.

Secondly, if it is going to be the injunction that we are dealing with, we do renew our request for discovery. We think that they have got an obligation to prove irreparable harm to get even a permanent injunction, for reasons that we are happy to lay out for the Court, given the opportunity to do so, or I can even discuss it today if the Court wants. And there are serious questions about their ability to do so.

[5] We also have questions about the harm that would be inflicted by improvidently entering an injunction, as well as of the balancing of the equities that the Court traditionally does in any kind of injunction, whether it is preliminary, permanent, or temporary. We would respectfully request the opportunity to do so.

Again, our preference is to move forward to a trial. We have tried to work something out with the plaintiffs. That was not successful. And unless the Court enters an injunction, we respectfully submit that there is no injunction.

THE COURT: I will certainly, if Mr. Nachbar wants to respond, I will absolutely hear from you.

One of my reactions to what you have said, Mr. Margules, is that I am going to decline the plaintiffs' invitation to engage a summary process at the outset. So that is not on the table for discussion at this stage, at this stage of the proceedings, remembering that we are talking about the plaintiffs' request for preliminary injunction. I did ask a question back in our informal discussion that I didn't exactly get and answer to, which we will need to discuss, should we proceed forward to, as you suggest, to a trial on the merits of the contentions here today.

Just to refresh your recollection a little bit, [6] so you can think about the question, is, what was—you don't have to answer it right now, because we are going to have a further discussion about it after Mr. Nachbar speaks—what was Delaware doing prior to 1990 there specifically in the statute, in PASPA, insofar as the issue of single versus parlay betting is concerned? Because you will recall that one of the things that I said was that, given the way the issue has been framed, I think probably correctly, and everybody seems to agree that the focus of the parties' and the Court's attention should be on the so-called single game bet—I think that is agreed?

MR. NACHBAR: Yes, that is agreed, Your Honor.

THE COURT:—then you will recall I said, if Delaware wasn't engaged in activity, it may be the case that Mr. Nachbar is right and my initial statements earlier on in the conference were wrong and maybe it is subject to, after all, a summary proceeding.

But at least for now, for the moment, I am going to decline that invitation to accept the motion for summary judgment.

Go ahead.

MR. MARGULES: Your Honor's question, I think, has, as I think Your Honor recognizes, has some subtleties to it. I guess my request would be that we have an opportunity to address that in writing next week.

[7] THE COURT: I think that's fair. I am not trying to ambush you or trap you. I think, as a good lawyer, that's a smart thing to do.

MR. MARGULES: Thank you, Your Honor.

THE COURT: Mr. Nachbar.

MR. NACHBAR: Thank you, Your Honor.

I think it's very clear that there is no fact dispute.

When Mr. Margules is addressing that issue in writing next week, one thing he might want to address is the issue of collateral estoppel, because, after all, the State was involved in a proceeding about the 1976 games. There is a very careful and very thorough description of that. And there is a ruling based on the facts as found by the Court after an evidentiary hearing.

So I don't believe that the State is saying that Judge Stapleton got it wrong. But regardless of what Judge Stapleton said, whether he got it right or wrong, the fact is, collateral estoppel would apply because they won a case based on those very findings. The findings were the State's description of what it was doing.

I don't really think there is a dispute about what was done in 1976.

I think it's also undisputed what the State plans to do in 2009. There may be some subtleties about [8] exactly how they are going to do the single-game

betting. But they plan on doing single-game betting, we know, at a minimum, on NFL games. They plan to do over-under betting on single NFL games. They plan on having betting about major league baseball. They plan to have betting about NCAA football, at least. And they reserve the right to themselves to have betting on all sports.

So I think we have a ripe dispute. And I don't think there really is any factual dispute about either what was done in 1976 or what is proposed in 2009.

The issue is one of statutory construction. And the question is, given what PASPA says—though I guess the first question is: Is it clear on its face? If it's not clear on its face, then what do we glean from the legislative history? Neither of those questions requires discovery. If it's clear on its face, then we look only at the statute. If we need to get into the legislative history, that legislative history is what it is. And we are not going to be taking Senator Biden's or Vice President Biden's deposition to learn what he meant in the Senate Report.

So there really is no factual dispute.

We think, at the end of the day, this can be adjudicated on a summary proceeding.

I guess that leaves us with what we do going [9] forward. We really have two proposals.

THE COURT: I think you are going to have to wait for a moment before that, because I have a ruling to announce.

MR. NACHBAR: I guess, before we get to that, the other things that I would say are, in terms of irreparable harm, there is two aspects to irreparable harm. There is irreparable, and there is harm. And I don't

think that harm is or can be disputed. The Senate found harm. That is why they passed the statute. We have cited the cases that indicate—

THE COURT: I agree. I don't think that that is a matter of fair dispute.

MR. NACHBAR: Great. So the only question is: Is whatever harm that would result from the proliferation of sports betting irreparable?

THE COURT: And I am prepared to rule on that, Mr. Nachbar. I don't need further argument. I have had the benefit of very articulate and well-advanced positions.

MR. NACHBAR: I would only point out that the State has never identified any type of remedy other than injunctive relief. They have never said that there is any other remedy available. We don't believe that there is.

Then, finally, is balance of hardships. It's now, I think, undisputed that the State projects from sports [10] betting, both direct revenue from sports betting and what I will call the synergies, the crossover, the theory that people who come to bet on sports will also play slot machines, their own declaration says the total for that for fiscal 2010 is 17 million dollars.

One could, I guess, dispute how that gets spread out over the course of the year. But it's on average 1.7 million per month, as opposed to a three-billion-plus-budget. So I think it's undisputed that if this were delayed for two months, to have a trial or summary judgment or whatever, the State would lose something like one-tenth of one percent of its budget. We don't think that's irreparable harm for the State. We think that's de minimis.

The only other point I would make is that I believe that it's in everybody's interest, including the State's interest, to get an adjudication of whether the sports betting scheme they propose is compliant with PASPA or violates PASPA. I assume that if it violates PASPA, they would want to know that, and, acting responsibly, would not want to go forward with an illegal betting scheme.

Thank you, Your Honor.

THE COURT: Yes, Mr. Margules.

MR. MARGULES: Your Honor, if I may add a couple things.

[11] Mr. Nachbar said that the State hasn't identified other remedies here.

The fact is that the State hasn't had an opportunity really to deal with anything in connection with this lawsuit. The Governor offered to meet with the heads of the NFL and I believe other leagues to discuss their concerns and to talk about ways to ameliorate them. They were unwilling to meet with the Governor.

Our only opportunity to make submissions in this case so far has been a letter on scheduling and also a conference last week and this week on scheduling. We have not had an opportunity to gather or present evidence on harm that would accompany the entry of an order on the irreparable harm of the leagues. We haven't had an opportunity to present argument on those issues. We haven't had an opportunity to put before the Court or my friends here the legislative history that is filled with uniformly consistent statements that say the intent of the statute is to permit Delaware to do anything it was authorized to do—

THE COURT: But you would agree, Mr. Margules, wouldn't you, that if—and I know you have made your position clear that you don't believe the statute is clear on its face—if the Court concludes otherwise, we don't go there, we don't need to go there, as a matter of the canons of construction? You would agree with that, wouldn't you?

[12] MR. MARGULES: Well, I would phrase it a little differently, Your Honor.

THE COURT: Okay.

MR. MARGULES: First of all, there is a canon of construction in the Federal Courts that I know Your Honor is aware of that says very specifically, and there is lots of Supreme Court authority on this, that a statute will not be lightly construed to interfere with state prerogatives or state law absent a very clear expression of intent.

So we start out there. And there is nothing in this statute that indicates—

THE COURT: I agree—

MR. MARGULES:—an intent of Congress to prevent Delaware from doing anything—

THE COURT: Let me interrupt. That sort of goes to the merits of at least your legal argument with regard to statutory construction. I am looking forward to hearing further on that.

MR. MARGULES: The interesting thing is that that line of authority, that canon of construction, basically says exactly the same thing that the legislative history says: that the statute is not intended to interfere with anything that an excepted state, in this case Delaware, was permitted to do under Delaware law in 1976 or during that whole time period.

[13] We are not going to interfere with that.

That's what the canons of construction say and that's what the legislative history says.

THE COURT: But the statute itself says, to the extent the scheme was actually conducted, that is the initial inquiry, you would agree, would you?

MR. MARGULES: "Actually" is not in the statute. It was at one point, but it was taken out. The word "actually" appears in a different provision of the statute. I believe at one point it was in a draft of that provision but it's not —

THE COURT: I am sorry. I misspoke.

MR. MARGULES: I am happy to discuss this. If Your Honor looks—

THE COURT: The scheme was conducted.

MR. MARGULES: Part of the question is what is a scheme.

THE COURT: I am not prepared to have that discussion today, Mr. Margules. I know that you would have the Court cast it as a lottery. I am not is [sic] so sure—I haven't had a chance to think about that.

MR. MARGULES: If I can kind of crystallize where the rub is.

THE COURT: We are going to get to that.

The Court would like to announce its ruling. [14] Counsel don't seem to want to hear it. Maybe that's understandable, under the circumstances.

But I am going to do it anyway. And then you have your recourse, both sides will have your recourse to the Third Circuit Court of Appeals, should you elect to take that recourse.

So, counsel, in the exercise of my discretion, I have considered the applicable law, and carefully reviewed: the pleadings filed thus far in this matter; the federal statute at issue; the plaintiffs' motion for preliminary injunction; the plaintiffs' opening brief and attachments in support of the motion for preliminary injunction; the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced letter brief and the defendants' three-page single-spaced letter brief filed on August 3rd of 2009, as well as the defendants' four affidavits filed on August 4, 2009.

I have also considered the arguments of counsel for the parties during the one-hour teleconference, now extended until today, and I haven't kept track of time, but we started at 2:00 informally. That teleconference was conducted on July the 29th of 2009.

After giving due consideration to all of these things, the Court concludes that a preliminary injunction—keep in mind we are at the preliminary injunction phase of [15] these proceedings, counsel—is not warranted in this case. The Court will, therefore, deny the plaintiffs' motion.

With good reason, Federal Courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that "a preliminary injunction is an extraordinary remedy that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant," or to a defendant; "and (4) granting the injunction is in the public interest."

That citation, gentlemen and ladies, is the Nutra-Sweet case found at 173 F.3rd, 151. The jump cite is 153.

An additional quote: "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." That is the Opticians Association case, found at 920 F.2d 187 which, interestingly enough, had Justice Alito on its panel.

First, based on the record as it stands, the Court is not convinced that the plaintiffs will "likely succeed on the merits" in this case. In fact, both sides vigorously, even today, right up to this very time, and ably, contend that they are entitled to win on the merits. [16] Indeed, the plaintiffs propose, despite the nascent nature of this action, that the Court and the parties go straight into the summary judgment phase of the litigation. Specifically, at Page 2 of their August 3, 2009 letter brief, the plaintiffs ask the Court to treat plaintiffs' motion for injunctive relief as one for summary judgment. In addition, at Page 7 of their letter brief, the plaintiffs write, "Plaintiffs respectfully request that the Court treat their motion for preliminary injunction as one for summary judgment on Count I of the complaint, alleging violation of the Professional and Amateur Sports Protection Act," otherwise known as PASPA. Indeed, the plaintiffs propose "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in support of their motion for preliminary injunction and their letter brief of August the 3rd. In this matter, as whenever a party invokes the authority of the Court, the ends of justice dictate that a Judge, whenever possible, where possible, proceed with deli-

beration and caution, especially when a party seeks extraordinary relief of the type at issue here.

On the current record, the Court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if [17] anything, the State actually did in the past with respect to sports gambling; or, as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the Court cannot say that the plaintiffs will likely succeed on the merits.

Second, the Court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the Court granting preliminary injunctive relief. In enacting the federal legislation at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Federal Rule of Civil Procedure 65(a), and considering the language of the actual statute at issue, these findings do not, in this Judge's view, mandate or require under all circumstances that this Court grant preliminary injunctive relief. In other words, this Court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or per se establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the Court consider this factor along with and in the context of [18] each of the factors courts traditionally consider when confronted with a request for a preliminary injunction.

In addition, I believe it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the Court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished Judge of this Court and now the Third Circuit Court of Appeals, the Honorable Walter K. Stapleton, wrote the following: ". . . I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, per se, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score. . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling," the [19] Judge continues, "on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs or their reputation."

Today I see some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA and that another 16 years have elapsed since the passage of that act and the reappearance of the NFL, along with other parties, before this Court, making similar claims to being in imminent danger of having their reputations and good will compromised because of yet

another attempt by Delaware to engage in gambling activity associated with professional football and other sports.

The irony is this: During the course of the Court's discussion with counsel last Wednesday, counsel for the defendants made some apparently fact-based assertions which, while certainly not the equivalent of evidence-based findings of a Court or the Congress of the United States, are, I think, at least, relevant to the Court's consideration of the issue of irreparable harm when asked, as I have been asked, to grant a request for a preliminary injunction, or preliminary injunctive relief. Counsel observed, "For example, the New York Times reported two years ago that the MotorCity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch [20] co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA the Sacramento Kings are owned by the same people who own the Palms Casino in Las Vegas . . . The Chairman and CEO of Harrah's owns a stake in the Celtics"—that would be the Boston Celtics—"There are plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting lines . . . injury reports . . . advice on which side of a bet to be on. Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets. The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angles, the Dodgers, the Marlins and the Cubs [all major league baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries . . . The NHL hosted its 2009 Player Awards in the Palms Casino."

Counsel went on a little beyond that, but I choose not at this point continue this quote.

Clearly, circumstances have changed materially since Judge Stapleton issued his ruling in 1977, that is, the Congress enacted PASPA. This Court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of [21] these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left intact the ability of judicial officers to apply well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enacts of Congress, which, upon the judgment or finding of a named party or official, seem to require the Court to do a thing such as issue an injunction, for example, the Emergency Price Control Act of 1942 which provides that an injunction "shall be granted without bond," PASPA, under the subheading "Injunctions," provides: "A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States."

Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.

Third, the Court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the Court also [22] cannot say that granting an injunc-

tion in this case is in the public interest. In fact, given that the defendants' claim they intend to use moneys raised from the activities at issue in this case to help balance the State's budget, the converse may well be true. At this juncture in the proceedings, the Court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.

In considering and balancing the preliminary injunction factors, and in light of the present record at this early stage of this case, the Court concludes that a preliminary injunction is not appropriate. The plaintiffs' motion for preliminary injunction is therefore denied.

At some point, when I return officially from vacation, I will issue a more formal written ruling, counsel.

So I think now, Mr. Nachbar, and Mr. Margules, it is left for us to discuss going forward.

Obviously, I think, given the Court's ruling—there have been some interesting new things put on the table—I think we do have to contemplate perhaps proceedings that might lead to ultimately a trial. But having said that, you raise—first, in responding to Mr. Margules's request, and I think a perfectly understandable request, I am fully prepared to grant an opportunity for him [23] to further contemplate the Court's question. That is, what was actually going on during that 1976 to 1990 time frame, because I think that's going to help inform what you have to do in terms of discovery.

I am not—I want to make it clear—I am not prepared to have this case travel the road that has already been traveled, attempted, at least for purposes of non-single-game bets, to determine what is a

skilled game is and what is not. That is not germane to the inquiry, in my view, as to whether the proposed scheme by Delaware violates PASPA.

So I see the question is, from the point of view of discovery, a very narrow one. That is, what were you doing, you—obviously, Mr. Margules, what was the State of Delaware doing. This may, at the end of the day, depending upon the answer to that question—and I don't need to remind anyone, these are all fine lawyers in front of me, that you are all officers of the courts, advocates, zealous ones, to be sure, but officers of this Court. And I expect, as all judges expect, straightforward answers to questions that we propound to you.

That is going to inform to a great degree the balance, and the nature, how these proceedings are shaped going forward. It may lead ultimately, depending upon the answer to, the Court to accept the very proposition that Mr. [24] Nachbar has advanced thus far. That is that maybe the matter would lend itself to summary disposition. I don't know. I am willing to give the parties a chance to play that out.

We have also informing what we need to do the question Mr. Nachbar has posed. That is whether there is some issue of issue preclusion or claim preclusion that the Court is going to have to address based upon Judge Stapleton's 1977 opinion, the 1976 six-day trial.

So that's going to need to be addressed.

These are some of the things we need to talk about right now, in terms of going forward.

I have selected, just to help further guide you, a trial date of December the 7th, perhaps ironically,

Pearl Harbor Day. That wasn't intentional. It's simply the case that, my thinking was that, well, we need to be an expedited schedule. Everyone has agreed upon that. We agreed on that, I think wisely, both sides, during the teleconference. I believe I heard Mr. Margules to suggest maybe a January time frame for trial. This Court is not going to be available. I have a Multi-District Litigation case that cannot be moved, a patent case, in January.

I hate to schedule a matter like this around the holidays, but I tried to do it earlier on in December than not. Frankly, it is a time that I selected that—one of [25] the few breathing periods that we have. I can't move criminal cases, I won't move them, to the advantage of a civil case. The Constitution doesn't permit that.

So that is what we have.

I could possibly go one week later. I don't know that you really want to be beginning this thing on the 14th of December. I really don't think so. Your families might want to disown you. Mine might want to disown me.

That is a possibility. That's a possibility.

We need to provide for the possibility that we may never get there, in light of everything that has been said thus far.

Let me just tell you—and we can talk about these dates—I had also thought about a discovery cutoff of 10/5, roughly two months for all discovery. I don't know, and I don't think we are going to need expert discovery.

MR. MARGULES: I think we are going to need—

THE COURT: To address what issue?

MR. MARGULES: There will be two issues that we have identified. One is if our friends are pressing the claim that the single game with the line is not dominated by chance.

THE COURT: We are not going there, Mr. Margules. The answer to the federal question, Claim 1, is [26] going to resolve Count II, in my view.

MR. MARGULES: Very well.

THE COURT: We are not going there.

MR. MARGULES: We will have to confer about whether we need expert testimony. We would have to work that through. I can get back to the Court next week on that.

THE COURT: Mr. Nachbar, what is your view?

MR. NACHBAR: I continue to believe that summary judgment on Count I is what is appropriate. I don't think that anything about luck or skill is involved in Count I.

THE COURT: I agree absolutely. I don't think that the defendants are contending that.

MR. NACHBAR: Correct.

THE COURT: That is not your contention, is it, Mr. Margules?

MR. MARGULES: Not for Count I, Your Honor.

MR. NACHBAR: But, I do think that there is still a Count II in the complaint, and if PASPA were repealed tomorrow or had never been enacted, we would still have a Count II. And I think, obviously, a ruling that the betting scheme violates PASPA makes Count II moot, because at that point we don't care, probably—

I guess it may not technically be moot because PASPA could be technically repealed, I suppose.

[27] But it's certainly moot for—

THE COURT: Is there some movement to repeal PASPA that I am not aware of?

MR. NACHBAR: Not that I am aware of.

THE COURT: I thought maybe the Vice President was already down there working his magic, I wasn't sure.

(Laughter.)

MR. MARGULES: Your Honor, actually, there is litigation in New Jersey challenging the constitutionality of it.

MR. NACHBAR: I suppose it could be declared unconstitutional, in which case Count II would be very important. My point is, Count I will not determine Count II. In other words, a ruling, if there were one, that the betting scheme doesn't violate PASPA would say nothing about whether it violates the Delaware Constitution or not, because it's just a completely different question.

So, again, what we think would be appropriate would be summary judgment on Count I only, because that one doesn't have contested facts, we believe. When you get to Count II, I agree with Mr. Margules, that expert testimony will be necessary and important because the question then becomes: Is a single game bet on the NFL or another sport predominantly a game of chance?

We think that that is something about which [28] expert testimony would be necessary.

THE COURT: Then the question for both of you is: Can you complete that discovery by the proposed cutoff?

MR. NACHBAR: We can.

MR, MARGULES: We can, too, Your Honor.

THE COURT: So, then, the cutoff for all discovery will be October the 5th. Is that fair? That's my question. Does that give—

MR. NACHRAR: I was really thinking more in time for a December 7 or December 14 trial date. I would think that—we might be able to agree, because we are in the same boat in terms of having to get experts and depose experts, that we might have fact discovery—

THE COURT: Do you want to stage the expert discovery?

MR. NACHBAR: Exactly.

MR. MARGULES: Yes.

THE COURT: That is fine. Tell me if you disagree: I don't think—I know you agree. I don't think the expert discovery is going to inform the summary judgment process.

MR. NACHBAR: Correct.

MR. MARGULES: Again, Your Honor, the question—

THE COURT: Isn't it reasonable to conclude that [29] we are probably going to have experts on either side?

MR. MARGULES: I think the question of whether experts come into summary judgment, really, it's a question of the scope of the summary judgment. If

irreparable harm is part of that mix, then there may be a need for some testimony on that.

But I think that Mr. Nachbar's suggestion, I think, is—and if it is, I join in it, if it is not, then I make it—if we have an opportunity to confer with each other, I think we can probably come with up with deadlines that would work with the parties and hopefully work for the Court.

THE COURT: They have to work for the Court, Mr. Margules.

MR. MARGULES: Absolutely. If they don't, Your Honor will adjust them.

THE COURT: Here is your guidance. I am going to need some decisional time between—here is what I am contemplating—and you can sit down, gentlemen.

Here is what I am thinking about as a summary judgment schedule, which I predict is going to end up only addressing, needing to address, Count I, if at all, if there are no material facts in dispute, then I think that's going to be it as to Count I.

10/12 being the deadline, the cutoff, for filing [30] summary judgment motions. Answers, October 15. Replies 10/26.

You are not briefing under the Local Rule. You are briefing under the Court-imposed schedule. Your page limitations are 20, 20, and ten.

MR. MARGULES: Your Honor, I may have heard the Court wrong. I thought Your Honor said 10/12 for the opening brief and then the answer three days later on the 15th.

THE COURT: If I said the 15th. I may have misspoke. I meant the 19th. And then the 26th.

By the way, Mr. Nachbar, I am going to going impose on plaintiffs the obligation of preparing this case management order. Please get it over to Mr. Margules and his team, let's get it filed no later than ten days from today.

MR. NACHBAR: That is fine. No problem.

THE COURT: File that electronically. It shouldn't really take ten days to do that.

So you heard me on the 20, 20, and ten-page limitation.

MR. NACHBAR: We did, Your Honor.

THE COURT: Anybody want to squeal about that right now?

MR. NACHBAR: I think it may be difficult, and a [31] little bit of latitude may be helpful to both parties.

THE COURT: I am going to give you a clear direction. Here is the basis. The Court is changing its rule. Delaware counsel are used 40 to, 40, and 20. And you inevitably get lawyers to fill up the pages. We don't need that many pages to decide most issues. As you know, Mr. Nachbar, we deal with a lot of complex issues around here. And we find that they are nicely addressed in 20, 20, and ten. And, frankly, I have adopted that rule—the Court is now going to adopt it—from my contact and experience with my colleagues in the Southern District of New York, which I think it goes without saying hear a lot of complex litigation. It works pretty well. I am going to adopt it here.

MR. NACHBAR: We will follow it.

THE COURT: Pretrial order due would be 11/9, close of business, 11/9.

Convene a pretrial conference on 11/19, beginning at 9:30 here in this courtroom.

And as I said, a trial of 12/7. We will talk about the length of trial in a moment. It may be difficult to pin that down exactly. I shouldn't imagine that it would be much longer than, that we would need much more time than five business days to try this case.

Let's talk about that in a moment.

[32] Mr. Nachbar, did you have any thought from a case management point of view as to how you wanted to raise the issue of collateral estoppel if you want to raise it at all?

MR. NACHBAR: I think what I would like to do is see if there is a dispute first. And I suspect there won't be. If there is, then I guess we will deal with it, and collateral estoppel, I think, would be in play at that point. But I don't see a need to say that the other side is collaterally estopped from claiming something that they are, in fact, not claiming.

Let's see what they claim first.

MR. MARGULES: Your Honor, I think maybe the most efficient way for us to deal with this is for us to see whether we can come up with some kind of a stipulation that deals with the issue.

Maybe we can't, in which case we can throw the issue to Your Honor in whatever form is required, whether it is a collateral estoppel ruling or a trial issue. It may very well be that there are at least pieces of it that we can stipulate to.

THE COURT: Is that acceptable?

MR. NACHBAR: That is perfectly acceptable.

I think that there were published materials about what Delaware was doing in 1976. It was, obviously, a [33] public program. So I don't think it's really subject—the type of thing can be disputed. It's not like who ran the red light.

Second, there are briefs that the State submitted. And third, there is a ruling that the Court made.

So I think, when we piece all that together, I think we will be able to stipulate.

MR. MARGULES: I think that the tough issue, if there is one, is going to be the scope of what, of how we define what the State was doing. Are we just talking about the rules of particular games? Are we talking about the existence of statutes and regulations? Are we talking about the way in which the games were marketed? The way in which participants came and played the games?

But again, I think those are all facts that we can get to.

I do think we can deal with them.

THE COURT: Okay. So, counsel, I am going to leave it to you on your own, during your further meet-and-confer, to come up with a schedule for exchanging expert reports. That should be built into the schedule.

So, my question to you is, counsel, do you believe that the dates the Court has proposed are do-able? It's a very compressed schedule. You know, both of you, [34] things usually take a good bit longer here.

MR. MARGULES: I think we can probably make it work. The one date that gives us a little concern is one that parties tend to work out. If it is a problem,

the termination of discovery, it may be that we will get out in a month or two months and feel that we need a couple of other days.

But again, typically, Mr. Nachbar and I have worked together frequently, we can usually come to an agreement and come to the Court with that.

THE COURT: Because this is a little different from Chancery Court practice.

MR. MARGULES: I understand. It doesn't necessarily mean that we have to push out summary judgment briefing or anything like that.

THE COURT: All I am saying, you have already said the magic words, you need to come to the Court.

MR. MARGULES: Absolutely. We understand.

MR. NACHBAR: We think it is do-able, and we will abide by it.

THE COURT: All right. Length of trial. Difficult to say, I know. But what do you think?

MR. NACHBAR: I would think five days is more than sufficient. I have not had a chance to confer with my clients, obviously, since I have been in court.

[35] But I would think that five days would be sufficient.

MR. MARGULES: We agree. I am a little concerned that the hockey players might need translators, which will slow things down.

But other than that . . .

(Laughter.)

THE COURT: Counsel, let me just say a few words, additional words, about my process, since I don't frequently see the two of you and your colleagues over here.

Discovery disputes, should they occur, are not the subject of motions practice, counsel. You are not permitted to file motions to compel or motions for protection.

What you are permitted to do is come to the Court, after you have made every effort to resolve your disagreements on your own—and I do want to insist and will insist that those efforts involve more than just writing to one another, through letter or e-mail. You have got to talk, to try to work things out. If you can't, call up chambers. Chambers will give you a date for a teleconference.

I am only going to do that with you three times. Given this short span of time, I cannot imagine—I hope you are not here at all—but I can't imagine that you [36] would use that up.

So you will get on the phone, and my staff will tell you that, they will give you a conference date, a teleconference date and tell you no less than 48 hours before the date I need a letter jointly submitted, of bulleted items, not an argument. I don't want an argument. I will reject and send back the letters.

We will get on the phone. I guarantee you, almost, that we will resolve the dispute without the need for further submissions.

If I feel the need for further submissions, we will do them on an abbreviated basis in the form of letter briefs, very short letter briefs, should some novel issue arise in this case.

The pretrial order is on the website. You have to follow it, lest you waive something you don't want to waive. Download it. Lead counsel are responsible for making sure that you have complied with the pretrial order.

To the extent that you feel a need to engage in motions practice, and I am talking specifically about motions in limine, those motions, you have to agree on a schedule for the identification of those issues and briefing them and submitting those, complete briefs to tell Court at least by the due date for the pretrial order.

Any questions about that?

[37] Counsel, other than that, I think we have covered all of the scheduling matters that we need to talk about.

Anything else from a scheduling point of view that we need to talk about?

MR. MARGULES: Not from us, Your Honor.

MR. NACHBAR: Not that occurs to me right now.

THE COURT: Anything else at all, counsel?

MR. MARGULES: Not from us, Your Honor.

THE COURT: Mr. Nachbar. Anything else at all?

MR. NACHBAR: No, Your Honor.

THE COURT: Counsel, have a good days [sic].

(Conference concluded at 3:52 p.m.)

APPENDIX D

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT

[Filed 09/29/2009]

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.

JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 09-cv-00538)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellee having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: September 29, 2009

CLW/PBD/cc: Pauletta J. Brown, Esq.
Megan W. Cascio, Esq.
Kenneth J. Nachbar, Esq.
Susan W. Waesco, Esq.
Andre G. Bouchard, Esq.
Joel E. Friedlander, Esq.
David J. Margules, Esq.

APPENDIX E

CONSTITUTIONAL PROVISION

U.S. Const. amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

FEDERAL STATUTES

28 U.S.C. § 3701: Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702: Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3704: Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

Supreme Court, U.S.
FILED
APR 2 - 2010
OFFICE OF THE CLERK

No. 09-914

In the

Supreme Court of the United States

JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE LOTTERY OFFICE,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE, AND THE NATIONAL HOCKEY LEAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the grandfather clause of the rarely-litigated Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704, authorizes Delaware to conduct only the same state-sponsored gambling that it conducted during the grandfathered period, or also permits the State to offer new forms of gambling and gambling on different sports.

2. Whether the court of appeals acted within its discretion in deciding the merits of the parties' dispute in the context of a preliminary injunction motion, after determining that there were no disputes of material fact.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state that:

The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League have no parent companies.

No publicly held company owns 10% or more of the stock of the Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, or the National Hockey League.

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INTRODUCTION

This case involves a straightforward statutory-interpretation question concerning a rarely-litigated federal law as to which there is no division of authority. The issue is remarkably narrow. It is relevant to less than a handful of States, and there is no dispute that those States may conduct the same sports betting schemes they conducted before Congress enacted the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 ("PASPA").

The only disputed question is whether Delaware's ambitious plans for sports lotteries crossed the statutory line. The court of appeals correctly found that they did. The grandfather clause at issue here authorizes Delaware to conduct a sports gambling scheme only "to the extent that the scheme was conducted by that State" before PASPA's enactment. 28 U.S.C. § 3704(a)(1). The undisputed facts demonstrate that Delaware's proposed expansions into new types of sports lotteries fall well outside of the scope of that grandfather clause. Because the statute clearly limits Delaware's proposed expansion, Delaware's invocation of the Tenth Amendment plain-statement rule is misplaced. More fundamentally, a State's interest in raising revenue must yield to federal law and is not the kind of essential sovereign function that triggers a plain-statement rule.

STATEMENT

A. The Federal And State Statutes

Following extensive hearings, Congress determined that sports betting "threaten[ed] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermine[d] public confidence in the character of professional and amateur sports," and "promote[d] gambling among . . . young people." S. Rep. No. 102-248 at *5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555. Based on these findings, Congress enacted PASPA in 1992 to broadly prohibit any "governmental entity" from sponsoring, operating, promoting, or authorizing:

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . ., on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702.

The statute includes a narrow grandfather clause applicable to only four States: Delaware, Montana, Nevada, and Oregon. *See* Pet. App. 18a; Pet. 8-9 & n.3. That clause excepts from PASPA's general prohibitions against sports betting:

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, *to the extent that the scheme was conducted* by that State or

> other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990.

28 U.S.C. § 3704(a)(1) (emphasis added).

For four months in 1976, Delaware conducted a limited sports lottery involving multi-game (parlay) betting on the outcomes of professional football games. Pet. App. 3a, 19a. Thirty-three years later, in 2009, Delaware enacted the Sports Lottery Act, Del. Code Ann. tit. 29, § 4825, to authorize *all* forms of sports betting, Pet. App. at 2a-3a, except that the Sports Lottery Act does not permit gambling on contests involving Delaware-based teams. *Id.* at 4a. On June 30, 2009, Delaware published proposed regulations stating that it planned to offer single-game betting on all events in all non-Delaware sports, beginning on September 1, 2009. *Id.* at 2a n.1 & 4a.

B. The Procedural Background

Respondents are four major professional sports leagues and the National Collegiate Athletic Association (the "Sports Leagues"). They filed suit in the United States District Court for the District of Delaware, alleging that Delaware's proposed sports betting violated both PASPA and the Delaware Constitution and seeking a preliminary injunction on their PASPA claim. *Id.* at 5a & n.2.

The district court denied the Sports Leagues' motion for a preliminary injunction. *Id.* at 21a-28a. Among other things, the court stated that it was "not in a position to give either side a nod on the merits" because "there may exist factual

disputes"—though no such disputes were identified. *Id.* at 24a.

The Sports Leagues appealed, and the United States Court of Appeals for the Third Circuit expedited the appeal so that it could reach a decision before September 1, 2009, the date Delaware intended to commence taking bets on National Football League ("NFL") games. *See id.* at 4a, 6a. After full briefing and argument, the court of appeals unanimously held that, on the undisputed facts of this case, "elements of Delaware's sports lottery violate federal law." *Id.* at 2a. The court then vacated and remanded for further proceedings. *Id.* at 20a.

The court of appeals explained that it is appropriate to decide the merits of an issue on appeal from a preliminary-injunction ruling if the "district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Id.* at 9a (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986)). Because "the parties agree upon what Delaware did in 1976 and what Delaware intends to do now," the court concluded that this case was "ripe for adjudication as matter of law." *Id.* at 12a.

On the merits, the court of appeals rejected Delaware's argument that PASPA's grandfather clause "allows it to conduct *any* 'sports lottery under State control.'" *Id.* at 13a (quoting Del. C.A. Br. 32) (emphasis added). The grandfather clause permits a State to conduct a gambling scheme only "to the extent that the scheme was conducted by

that State" between 1976 and 1990. 28 U.S.C. § 3704(a)(1). The court explained that this provision does not authorize all gambling by affected States. Instead, in the court's view, it authorizes States to conduct the same schemes they conducted between 1976 and 1990. Pet. App. 13a-17a.

Because the court of appeals determined that PASPA's plain language is "unmistakabl[e]," it rejected Delaware's reliance on a plain-statement rule and "generalized notions of 'state sovereignty.'" *Id.* at 18a. The court also found PASPA's legislative history unilluminating because it "offer[s] no consistent insight into Congressional intent." *Id.* at 17a n.5.

Finally, the court of appeals emphasized the limits of its holding. Delaware may "institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976." *Id.* at 20a. In addition, "*de minimis* alterations," such as changes to the times and places at which tickets are sold, "may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change . . . ." *Id.* at 19a.

Without dissent, the court of appeals denied a petition for rehearing or rehearing *en banc*. *Id.* at 59a-60a. The district court then entered a final order permanently enjoining Delaware from conducting lotteries based on non-NFL sports or fewer than three games, while noting that PASPA does not prevent Delaware from conducting lotteries based on three or more NFL games. Final

Order, *Office of the Comm'r of Baseball v. Markell*, No. 09-538 (D. Del. Nov. 9, 2009).

In keeping with the court of appeals' decision, Delaware re-introduced parlay betting based on the outcomes of NFL games, in time for the start of the NFL's regular season. Pet. 20-21.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF PASPA DOES NOT WARRANT THIS COURT'S REVIEW

A. There Is No Division Of Authority

This case does not satisfy any of this Court's criteria for *certiorari*. First, there is no division of authority on the interpretation of PASPA. Indeed, the decision below is the first time a court of appeals has addressed any issue under PASPA. The court of appeals' decision thus necessarily does not conflict with any decision of another court of appeals. Nor does it conflict with any decision of *any* other court. Nor was there a dissent, from either the panel decision or the denial of rehearing en banc. And even the district court here did not resolve the merits. Thus, no judge of any court, at any level, has ever accepted Delaware's position on the merits.

B. The Question Is Not Extraordinarily Important

In the absence of any division in authority, an issue should be of exceptional jurisprudential

importance, or at least frequently recurring, to warrant this Court's review. Sup. Ct. R. 10(c). This issue is not. The Sports Leagues are aware of only one other decision that has ever addressed PASPA since the statute's enactment nearly two decades ago in 1992. *See Flagler v. U.S. Attorney for N.J.*, No. 06-3699 (JAG), 2007 WL 2814657, at *3 (D.N.J. Sept. 25, 2007) (dismissing Tenth Amendment challenge to PASPA for lack of standing). There are two evident reasons for the lack of PASPA-related decisions. The statute is clear and to the point. And the grandfather clause at issue here affects only four States, with only a minimal impact even on those four.

As Delaware acknowledges, the question presented here is "relevant only to the few States that had sports-gambling schemes prior to [PASPA's] enactment." Pet. 3. In theory, the grandfather clause affects four States: Delaware, Montana, Nevada, and Oregon. Pet. App. 18a; Pet. 8-9 & n.3. But the question would matter only if a State conducted limited sports gambling during the grandfathered period and later wanted to expand that gambling. Oregon no longer offers sports gambling, *see* 73d Oregon Leg. Assembly, HB 3466 (2005), and Montana has not attempted to take advantage of the grandfather clause in a way that has generated litigation. Nevada has had substantial sports gambling on a continuous basis. Thus, it is not clear that the issue has or will have practical significance in *any* State other than Delaware.

Even for Delaware, the practical impact is minimal. Delaware's only asserted interest is "to raise revenues in the manner it deems fit." Pet. 2. But it has been clear at least since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that States' ability to raise revenues is limited by federal law. The application of federal law to limit a State's ability "to raise revenues in the manner it deems fit," *vel non*, hardly gives rise to a question of exceptional importance that should be settled by the Court.

Moreover, Delaware indisputably has greater freedom to raise revenues than the 46 States in which PASPA prohibits sports gambling altogether. Thus, Delaware enjoys a substantial advantage over every State east of Montana and remains free to raise revenues from sports gambling in the same way it did 33 years ago, when it last treated sports gambling as a revenue source. Indeed, consistent with the court of appeals' decision, Delaware has gone ahead and conducted parlay betting on NFL games. *See* Pet. 20-21.

Delaware has not shown that *additional* forms of sports gambling would enable it to raise significant *additional* funds. Prior to the Third Circuit's ruling, Delaware itself was projecting total sports gambling revenues of just $17 million for fiscal year 2010—$14 million of which was attributed to an increase in the State's existing video lottery revenues due to "crossover" traffic, and only $3 million of which was directly attributable to sports betting—a trivial percentage of the State's $3.1 billion budget. C.A. App. 284-85,

329-30. And that included the projected revenue from NFL parlay-game betting. Thus, Delaware Governor Markell (one of the named petitioners) has assured the public that, "[w]hile we are disappointed the [court of appeals'] decision does not provide the flexibility we had hoped for, Delaware is still the only state east of the Rocky Mountains that can offer a legal sports lottery on NFL football . . . . We continue to believe this is an opportunity to create jobs and generate revenue . . . ." Statement by Gov. Jack A. Markell (quoted in A.J. Perez, *Court Gives Delaware More Specific Guidelines For Parlay Betting*, USA TODAY, Aug. 31, 2009).

Even if Delaware stood to gain significant additional revenues from additional forms of sports gambling, those revenues would likely come at the expense of neighboring States (or perhaps other forms of entertainment in Delaware). The net effect on the fiscs of the several States is thus unclear. Maryland, for example, offers gambling on horse races, and recently authorized slot-machine gambling, citing the stiff competition it was facing from neighboring States like Delaware. *See* Md. Dep't of Labor, Licensing & Regulation, *Slot Machines and the Racing Industry: A Review of Existing Data in Maryland and Neighboring States* (2007), http://www.gov.state.md.us/documents/SlotsAndRacing.pdf; Tom LoBianco & Emily Kimball, *Maryland OKs Slots*, WASH. TIMES, Nov. 4, 2008. PASPA's grandfather clause gives Delaware a competitive advantage over other States like Maryland by enabling it to offer limited sports gambling as well. Delaware's desire to

increase that competitive advantage even further is hardly a matter of exceptional jurisprudential importance warranting this Court's review. That is especially so because, as shown next, the court of appeals' decision is correct and follows directly from the statutory text.[1]

C. The Court Of Appeals' Decision Is Correct

The court of appeals' holding turns on a straightforward reading of an uncomplicated statutory text. And the court did not even definitively draw the precise line between permitted and prohibited sports gambling. Instead, it merely rejected Delaware's extreme argument that conducting a single type of sports lottery—a

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[1] The federal question here has even less importance if single-game sports betting violates the Delaware Constitution, as the Sports Leagues asserted as a separate claim for relief in their complaint. *See* Pet. App. 5a n.2. In March 2009, when Delaware's Governor asked for an advisory opinion on the constitutionality of Delaware's proposed sports betting, the Justices of the Delaware Supreme Court opined that single-game gambling would comply with the State Constitution only if "chance is the dominant or controlling factor." *In re Request of the Governor for an Advisory Opinion*, No. 150, 2009 WL 1475736, at *5 (Del. May 29, 2009) (citation omitted). Though the Justices declined to opine on the constitutionality of single-game betting without a factual record, they suggested that single-game betting poses a serious constitutional concern by explaining that, when a district court upheld NFL parlays against a state constitutional challenge in 1977, the court "found it noteworthy that '[n]one of the games permit[ted] head-to-head or single game betting.'" *Id.* at *8 (citation omitted).

multi-game NFL parlay—during the grandfathered period was the proverbial nose under the tent that entitles it to offer *any* sports lottery today, including single-game gambling and gambling on different sports. *See* Pet. App. 13a-14a, 19a-20a.

1. PASPA's grandfather clause covers "a lottery, sweepstakes, or other betting, gambling, or wagering scheme . . . *to the extent that the scheme was conducted by that State*" between January 1, 1976 and August 31, 1990. 28 U.S.C. § 3704(a)(1) (emphasis added). The simple reality is that Delaware did not conduct a gambling scheme on either single games or sports other than NFL football during the relevant time frame. *See* Pet. App. 12a; Oral Arg. Tr. at 76:11-77:4.

Delaware's attempts to show ambiguity in the statutory text fail. Delaware contends that "conducted" does not really mean *conducted*, but rather *authorized*. Pet. 24. (In Delaware's view, a Delaware statute *authorized* more betting than was actually *conducted* during the grandfathered period, and so Delaware is entitled to engage in more gambling under the grandfather clause if the clause permits anything that was previously authorized. *Id.* at 7.) As the court of appeals explained, however, the two words do not mean the same thing, and PASPA itself uses them to mean different things. Pet. App. 14a-15a. In the very next subsection, Congress distinguished between "conducted" and "authorized" by exempting certain betting that had been "authorized by a statute" in effect in 1991 *and* "conducted" between 1989 and 1991. 28 U.S.C. § 3704(a)(2). The fact that Section

3704(a)(2) uses the term "authorized," and expressly contrasts it with "conducted," makes it all the more clear that Section 3704(a)(1) does not use "conducted" to mean "authorized." *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

Delaware also argues that the term "scheme" must "be read at a level of generality." Pet. 26. Delaware's position in the lower courts was that the grandfathered "scheme" is simply a sports lottery under state control, such that (in Delaware's view) the State may now introduce "any" state-controlled sports lottery of any kind. Pet. App. 13a-14a.[2] In this Court, Delaware strives to make its position appear more plausible by stating that the term "scheme" should be read to look to the "essential parameters" of the gambling that occurred during the grandfathered period, so as to "permit[] lotteries that follow the same structure as the prior lotteries but vary as to details . . . ." Pet.

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[2] *See* Appellees' Combined Mot. to Dismiss App. 18 ("The 'scheme' that was previously conducted in Delaware was a sports lottery under state control. . . . So long as the particular games fit the definition of a 'lottery,' *Delaware is not confined to any particular sport or league or team, or to any particular attribute of a game that was played more than 30 years ago.*") (emphasis added); *see also* Appellees' Answering Br. In Opp'n to Appellants' App. 33 ("The scheme Delaware authorized and conducted was a sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events. That is 'the scheme' that Delaware may now implement.") (citation omitted); Appellees' Pet. for Reh'g *En Banc* 9 ("[T]he only legal constraint on Delaware is the breadth of what constitutes a 'lottery' under State control, a question of State law.").

26. If the State is changing its position to a narrower one than it took in the court of appeals, it did not properly preserve that position below, and this Court should deny the petition for that reason alone. But it appears that the State is not really changing its position because it concludes that "the 'scheme' that Delaware conducted was a lottery under state control in which winners of lottery games were affiliated with the outcomes of sporting events." *Id.* In other words, Delaware's bottom line continues to be that it may conduct *any* sports lottery of any kind.

However framed, petitioners' position is untenable. The statute refers not only to a "scheme," but to "a lottery, sweepstakes, or other betting, gambling, or wagering scheme." 28 U.S.C. § 3704(a)(1). Thus, the term "scheme" is not synonymous with just any lottery or betting; instead, lottery and betting *modify* "scheme," making clear that the statute refers to the specific scheme conducted during the grandfathered period, not just any scheme.

More fundamentally, as the court of appeals explained, Delaware's position falters on the fact that PASPA permits a gambling scheme only "to the extent that" the scheme was conducted during the grandfathered period. Pet. App. 14a. That removes any doubt that the relevant "scheme" is the gambling the State actually conducted during the grandfathered period. Delaware tries to construe "to the extent that" to mean "if," Pet. 25, but it does not. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109

(1993) ("By reading the words 'to the extent' to mean nothing more than 'if,' the Department has exceeded the scope of available ambiguity."); *id.* at 105-06 (distinguishing "if" and "to the extent" and emphasizing Congress used latter, not former); *id.* at 117-18 (Thomas, J., dissenting) (noting that Congress used "to the extent," and "[t]hat limitation does not mean that the exception is available to a contract 'if' it provides guaranteed benefits"). If Congress had intended to provide that *if* a State had a sports lottery in the past, it could run *any* sports lottery without limitation in the future, there were any number of more direct ways to say so. If, by contrast, Congress wanted to permit sports betting schemes only to the extent that States actually conducted such schemes, it used the precise words one would expect.

The petition maintains that its reading of "to the extent" to mean "if" is corroborated by a different provision concerning casino gambling, 28 U.S.C. § 3704(a)(3). But the court of appeals correctly observed that the structure and syntax of the two provisions are not directly parallel. Pet. App. 16a. Accordingly, even if "to the extent" means "if" in § 3704(a)(3), that unusual meaning of "to the extent" would come from differences in surrounding text and context. It should not support an inference that "to the extent" means "if" either generally or in § 3704(a)(1).[3]

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[3] In any case, it is far from apparent that even § 3704(a)(3) uses "to the extent" to mean "if." For example, it is not clear whether limitations on the manner in which gambling was

Indeed, the differences in the surrounding text underscore the error in Delaware's interpretation. Section 3704(a)(3) permits schemes "conducted exclusively in casinos . . . , but only to the extent that . . . *such scheme or a similar scheme* was authorized" at an earlier point in time. 28 U.S.C. § 3704(a)(3) (emphasis added). The plain import of that provision is that a scheme is permitted to the extent that the scheme *or a similar one* was previously authorized. In contrast, § 3704(a)(1) exempts schemes in operation in a State "to the extent that *the scheme* was conducted" during the grandfathered period. *Id.* § 3704(a)(1) (emphasis added). Thus, neither provision permits *any* scheme—whether similar to the previous scheme or not—so long as a State once had some other scheme. Moreover, § 3704(a)(1) is clearly the narrower provision because it does not embrace similar schemes, but expressly requires that "*the* scheme" in operation be the same one conducted during the grandfathered period.

Delaware seizes on the court of appeals' recognition that *de minimis* and non-substantive changes, such as changes in the time or location of lotteries, would not necessarily mean that a State

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authorized would limit the scope of the § 3704(a)(3) exception. If so, then "to the extent" would not be synonymous with "if." The question has never been litigated under PASPA. What is clear, however, is that even if the surrounding text and context did somehow render "to the extent" an awkward synonym for "if" in § 3704(a)(3) (*e.g.*, a child is an orphan to the extent that both his or her parents are deceased), "to the extent" is used in its normal, dominant sense in § 3704(a)(1).

had changed from conducting one scheme to conducting another. Pet. 24; Pet. App. 19a. But that unremarkable proposition hardly means that anything goes, such that changes from multi-game to single-game betting, or from football to baseball betting, are non-substantive. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). But both PASPA and the law generally do care about major substantive changes, and there is nothing *de minimis* about Delaware's proposed expansion of sports betting. Moreover, considering that Congress was attempting to stop the spread of sports gambling, giving four States free rein to offer any and all sports gambling in the future, beyond what they had previously offered, would have been a strange way to effectuate Congress's intent.

2. Delaware argues that this Court should apply the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to protect the State's "right to raise revenues in the manner it deems fit." Pet. 2; *see also id.* at 23-24. The court of appeals correctly held, however, that the application of a plain-statement rule would not change the outcome because the statute is unambiguous, as discussed above. *See, e.g., Salinas v. United States*, 522 U.S. 52, 60 (1997); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Gregory*, 501 U.S. at 470.

Delaware's contention that the legislative history is ambiguous may reinforce the skepticism of some about legislative history, but it is irrelevant for purposes of *Gregory*. *See* Pet. 27, 29. The legislative history is undeniably muddled, and thus unhelpful. Some snippets, such as those stating that state schemes are protected if they were previously "authorized" by state law, are flatly contrary to the statutory text requiring that the schemes were "conducted." Pet. App. 17a n.5. Other portions of the legislative history are internally inconsistent, such as on the question whether a scheme must have been authorized or conducted. *Compare* S. Rep. No. 102-248, at 10 ("as long as it was authorized by State law"), *with id.* at 9 ("prohibition does not apply . . . to the extent that such scheme actually was conducted"); *compare also* 138 Cong. Rec. S7274, S7276 (1992) (Sen. DeConcini) ("an exemption for those sports gambling operations which already are permitted"), *with id.* at S7281 (Sen. DeConcini) ("prohibit sports lotteries in all the States except what is already being conducted"). And as Delaware acknowledges, other portions expressly reject the State's position on the specific question whether single-game betting is grandfathered for Delaware. Pet. 29 n.10; Pet. App. 17a n.5.

The muddled nature of the legislative history only confirms that the answer lies in the statutory text. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). For purposes of *Gregory*'s plain-statement rule, a "statute can be unambiguous without addressing

every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas*, 522 U.S. at 60 (quoting *Gregory*, 501 U.S. at 467). As explained above, that is the case here.

In any event, the *Gregory* plain-statement rule does not apply here for a number of additional reasons. The rule does not govern in every "area traditionally regulated by the States." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995) (quoting *Gregory*, 501 U.S. at 460). Instead, it applies only to "a decision of the most fundamental sort for a sovereign entity." *Id.* Or, as some other cases have phrased it, the rule applies only to "essential" state interests and functions. *Yeskey*, 524 U.S. at 209; *BFP*, 511 U.S. at 544. That limitation is important because in this day and age *most* federal regulatory statutes could probably be said to intrude on areas traditionally regulated by the States. Unless *Gregory* is to become the general rule, only the most serious intrusions on sensitive interests warrant a departure from normal interpretive principles.

Here, neither Delaware's interest in maximizing its competitive advantage over neighboring States nor its more generalized desire "to raise revenues in the manner it deems fit" (Pet. 2) is a core state function. Maximizing revenues from a lottery is simply not on the same plane as determining, for example, the tenure of state judges. Indeed, regulating gambling on a nationwide basis has long been a federal function, as confirmed by this Court's decision more than a century ago in

Champion v. Ames (Lottery Case), 188 U.S. 321 (1903). A State might see fit to raise revenues in any number of ways—imposing duties on imports or exports or taxing federal banks—that would hardly represent essential state functions or exempt a State from governing federal law. *See, e.g., M'Culloch*, 17 U.S. (4 Wheat.) at 327; U.S. Const. art. I, § 10, cl. 1; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-53 (1980) (state agencies' generalized interest in raising revenue did not justify taxation that intruded on federal regulatory scheme).

Moreover, "clear statement" rules are designed to "assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002). There was no unintended intrusion on the States here. Congress specifically focused on the extent to which PASPA limited state-sponsored sports gambling. The grandfather clause at issue here applies *only* to schemes operated by "a State or other governmental entity," and its *sole* focus is to determine the extent to which a few States may continue to offer sports gambling—the precise question presented here. 28 U.S.C. § 3702(a)(1).

If any presumption applies here, it runs in the opposite direction. Exceptions to general rules, such as the grandfather clause's exception to PASPA's otherwise broad prohibitions on sports gambling, are generally construed narrowly. *City of Edmonds*, 514 U.S. at 731-32. The Court need not rely on any presumption, however, because the

statute's import is clear under the ordinary interpretive principles discussed above.

II. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW

There is no reason to review the court of appeals' entirely unobjectionable procedural decision to decide the merits of the parties' dispute. It "has long been the rule" that, in reviewing preliminary injunction rulings, appellate courts may "proceed further and address the merits." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008); *see also Thornburgh*, 476 U.S. at 756 (approving of court of appeals' decision to reach the merits). As Delaware acknowledges, a court of appeals may resolve the merits in this posture when "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." Pet. 30 (quoting *Thornburgh*, 476 U.S. at 757). The court of appeals expressly applied that very standard. Pet. App. 9a-12a.

Delaware objects only to the court of appeals' application of that well-settled legal standard. *See* Pet. 30-31. But the application of settled legal principles to the record of a particular case does not remotely warrant this Court's review. *See* Sup. Ct. R. 10. In addition, Delaware conceded in the court of appeals that the facts about its gambling scheme in 1976 and the scheme it currently wishes to implement are undisputed. Pet. App. 12a; Oral Arg. Tr. at 65:8-9; 65:19-66:6; 76:11-77:4. The court

of appeals was entitled to rely on that concession. *See* Pet. App. 12a.

Even now, Delaware's attempt to identify factual disputes only confirms that there are no *material* disputes of fact. Delaware asserts that it would like to introduce expert testimony to the effect that its proposed sports gambling would not be substantively different from the scheme it conducted during the grandfathered period, but instead would be a *de minimis* change akin to changing the time or location of a lottery. Pet. 24, 31-32. Given that the facts are undisputed, however, which side of the line they fall on is a question of law for the court, not for an expert witness. And the court of appeals quite rightly determined that offering entirely different games concerning entirely different sports is anything but a *de minimis* change. In any event, if all that is at issue is the scope of a *de minimis* change to the details of the Delaware scheme, that only underscores that this case does not implicate an essential sovereign interest or any exceptionally important question warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE LOTTERY OFFICE,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTRODUCTION

Delaware seeks review not because this case presents an inter-circuit conflict, but because, in an unfairly truncated proceeding, Delaware was permanently deprived of an historic prerogative to raise revenues that Congress had expressly preserved and that the State sought to use to respond to a fiscal crisis. This case is vitally important to Delaware. Yet the Third Circuit issued a final judgment interpreting the relevant provision of the Professional and Amateur Sports Protection Act ("PASPA") and abrogating Delaware's right to raise revenues on review of the denial of respondent Sports Leagues' motion for a preliminary injunction. The State was thus denied a full opportunity to present argument and evidence about the scope of its retained rights. And, despite the proceeding's patent unfairness, Delaware has no realistic possibility of reconsideration of the court's PASPA interpretation unless this Court grants review, because the provision at issue applies to only a few States.

In opposition, the Sports Leagues claim the Court's traditional criteria for certiorari are not met. But this Court has granted review where, as here, a matter is critically important to a State, infringes its sovereign interests and would otherwise evade review. See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009).

Moreover, as the Sports Leagues recognize, the case presents the important question whether *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) – which requires Congress to make "unmistakably clear" its intent to constrain the States' "substantial sovereign powers" – applies to federal statutes that constrain the States' revenue-raising authority. Opp. 18-20. It

also presents the related, significant question whether the plain-statement rule applies to a federal statute's *general mandate or prohibition* (here, PASPA's prohibition of sports gambling) or to the *specific section* addressing the State's retained rights (here, PASPA's preservation of Delaware's authority). Both issues merit this Court's attention.

Had *Gregory* been correctly understood, the Third Circuit would have interpreted PASPA to authorize Delaware to conduct sports lotteries unrestricted with respect to the leagues or the details of the lottery's games. The Sports Leagues' contrary contention rests on arguments that reveal PASPA's ambiguity, thus implicating the *Gregory* rule.

Finally, the Sports Leagues belittle the importance of Delaware's contention that the Third Circuit's decision to reach the merits was contrary to this Court's precedent and fundamentally unfair. Opp. 20-21. But, the combination of procedural unfairness, the case's importance to Delaware, the Third Circuit's misunderstanding of *Gregory*, and the absence of another avenue of review warrant this Court's attention.

ARGUMENT

I. ABSENT REVIEW, DELAWARE WILL BE PERMANENTLY DEPRIVED OF SOVEREIGN RIGHTS CONGRESS PRESERVED FOR IT.

The Sports Leagues contend this case is not sufficiently important for this Court's review. Although the case does not fall within the traditional paradigm, review is warranted.

First, PASPA reflects a compromise. Congress did not enact a flat prohibition of sports gambling. It

crafted provisions reserving to specified States the right to raise revenue by this means. New Jersey had an opportunity to conduct sports gaming. And, Delaware, Montana, Nevada and Oregon were authorized to continue sports gambling under schemes previously in place. 28 U.S.C. § 3704(a)(1)-(3). The Sports Leagues argue that the limited scope of PASPA's exceptions makes their accurate construction unimportant. But, Congress chose to preserve a small group of States' rights to raise revenues through sports lotteries. That choice should be respected, not ignored.

Second, the Sports Leagues opine the loss of this right is unimportant. But, Delaware's retained right to raise revenues, including through a sports lottery, is a fundamental sovereign interest. This Court characterizes the States' power "to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits" as "the most plenary of sovereign powers." *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932). See also *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 806 (1983); *Leigh* v. *Green*, 193 U.S. 79, 89 (1904). Operating a lottery to raise funds is a traditional state function.[1] Of course, as the Sports Leagues state (Opp. 8), the federal

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[1] Lotteries "enjoy an honored place in American history as a device for raising funds for public purposes. They provided funding for such projects as the Jamestown settlement, Harvard College, and the Continental Army, as well as public works projects throughout the Colonies and early States." Charles T. Clotfelter et al., *State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission* 1 (Apr. 23, 1999), http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf.

government can limit the States' authority to raise revenues (and in many other respects). That does not make the States' power less important to their sovereignty and ability to govern.

Moreover, facing record deficits, Delaware enacted the sports lottery as part of its solution to fiscal crisis. Pet. 12-14. The Sports Leagues fault Delaware for an alleged failure to demonstrate that more than a few million dollars were at stake. Opp. 8. The State, however, projected indirect and direct benefits of $17 million *for the relevant portion of the sports lottery's first year*, Pet. 15-17 (estimating $17 million for ten months), plus increased revenues and employment at the racinos hosting the lottery, *id.* This evidence was submitted in opposing issuance of a preliminary injunction, which unfairly became the entire record on the merits. The State had no opportunity to present evidence about the games' long term fiscal benefits.[2]

The Sports Leagues argue the case lacks practical importance because Governor Markell made the best of the decision below, offering the limited lottery the State was allowed to sponsor. Opp. 9. But Delaware sought review because it cannot raise revenues to help balance its budget and address its citizens' needs in a manner Congress preserved for it. By doing what he can while asking this Court to correct the

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[2] The Sports Leagues argue, without citation, that the case is unimportant because if Delaware prevails, its "significant additional revenues . . . would likely come at the expense of neighboring States." Opp. 9. Congress, however, decided that considerations of fairness weighed in favor of Delaware and the excepted States. *See* Pet. 10.

decision below, the Governor is doing his job, not suggesting the issue is unimportant.[3]

Finally, review is warranted because otherwise this issue, of critical importance to Delaware, will have been finally and likely permanently decided in a proceeding which denied Delaware its right to present evidence and argument on the merits. This Court's general practice of awaiting a conflict is inapt here. This case is akin to an important case arising from the Federal Circuit's exclusive appellate jurisdiction in which no conflict can develop, but the Court nonetheless grants review to address an important question which will otherwise escape review.

II. THE CASE PRESENTS IMPORTANT QUESTIONS ABOUT *GREGORY*'S SCOPE AND APPLICATION.

The Sports Leagues' discussion of the merits shows why this Court should grant the petition. The case presents important issues with respect to *Gregory*'s scope and interpretation in a context of vital importance to the State.

A. The Sports Leagues contend a sports lottery is not a "core state function" and therefore that *Gregory*'s "plain-statement rule" does not apply to construction of the relevant PASPA exception. Opp. 18. They can advance this argument only because this Court has not enunciated a general standard for determining those "traditional and essential state

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[3] The Sports Leagues suggest the issue may not be worthy of review because single-game betting may violate the Delaware Constitution. Opp. 10 n.1. In fact, the Delaware Supreme Court simply declined to decide that issue without further evidence. Pet. 14.

function[s] subject to the plain-statement rule of *Gregory*," *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) ("assuming" application of *Gregory*), or determined definitively whether the States' authority to raise revenues through a lottery constitutes such a function. This Court instead has conducted a case-by-case assessment of whether an asserted state interest is sufficiently weighty to invoke the plain-statement rule without offering a general standard for determining "'traditionally sensitive areas.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); see also, *e.g.*, *Gregory*, 501 U.S. at 460-61. This Court should grant the petition to provide guidance concerning which State interests implicate *Gregory*'s plain-statement rule.

Whatever line this Court might draw, Delaware's asserted interest – operation of a sports lottery to raise revenues to help close an historic budget gap – is "the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As discussed *supra* at 3, this Court has described the States' revenue-raising authority as "the most plenary of sovereign powers." *Lawrence*, 286 U.S. at 279. See also *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-27 (1959). PASPA "upset[s] the usual constitutional balance of federal and state powers," *Gregory*, 460 U.S. at 460, just as much as, for example, age discrimination laws, *id.*, at 460-62, or limitations on State taxation authority, *Dep't of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332 (1994).

The Sports Leagues raise a further important question about *Gregory*'s scope by asserting that it is not applicable in areas involving substantial federal regulation. Opp. 18. But, federal law pervasively regulates workplace discrimination, and *Gregory* nonetheless held that the Age Discrimination in

Employment Act could not be applied against Missouri without a clear statement. Similarly, the plain-statement rule was invoked in *ACF Industries*, *supra*, despite extensive federal regulation of the area at issue.

Finally, the Sports Leagues are wrong to suggest that *Gregory* is inapplicable because this case involves an "[e]xception to [a] general rule[]." Opp. 19. *Gregory* addressed an "exception[]" to the ADEA's general prohibition of age discrimination, 501 U.S. at 465, 467, yet this Court concluded that because the exception's scope was "at least ambiguous," it had to be construed in the State's favor, *id.* at 467.

In sum, this case raises substantial, important questions about *Gregory*'s scope.

B. Alternatively, the Sports Leagues wrongly contend that PASPA "unmistakably" forbids the lotteries that Delaware intended to offer. Opp. 11-16. The PASPA exception's scope is "at least ambiguous" as to whether it encompasses the sports lotteries Delaware proposed; and under *Gregory*, that ambiguity must be construed in the State's favor.

For the most part, the Sports Leagues attack a strawman. Opp. 11-12, 15. Delaware is not contending that it is entitled to conduct any sports gaming without regard to the scheme Delaware had in place during the grandfathered period. Rather, as the Leagues ultimately acknowledge, *id.* at 12-13, Delaware asserts that, at the very least, § 3704(a)(1) permits it to offer lotteries that "follow the same structure as the prior lotteries," or are "akin to those

that were part of" the prior lottery scheme. Pet. 26, 4.[4]

The Sports Leagues fail to show their reading of PASPA is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation omitted). They do not dispute that the term "scheme" in § 3704(a)(1) is "hardly [] self-defining," *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 US. 229, 241 n.3 (1989), or that its plain meaning includes a "design or plan formed to accomplish some purpose; a system," *Black's Law Dictionary* 1344 (6th ed. 1990). But, they say, "scheme" means only the "specific scheme conducted during the grandfathered period" because the term "scheme" is modified by "betting" and "lottery." Opp. 13. This does not follow; "scheme" may also be interpreted broadly or at a higher level of generality to authorize lotteries akin to those part of the previous scheme.

The Sports Leagues then argue that the phrase "to the extent" in § 3704(a)(1) cannot plausibly be read to mean "if." Opp. 13-14. Preliminarily, this point is not, as the Leagues suggest, *id.* at 13, a full answer to Delaware's interpretation. Even accepting the

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[4] The Sports Leagues contend that Delaware waived this argument because it argued below in favor of a *broader* reading. The notion that Delaware "waived" the argument in this context is absurd; Delaware did not get an opportunity to file a brief in the *preliminary injunction* proceeding before the district court; and the Third Circuit *sua sponte* decided the case on the merits. Pet. 15-18. Moreover, Delaware clearly presented the claim that its proposed lotteries were permissible under PASPA. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

Leagues' premise, the statute grandfathers "schemes." If "scheme" is given its natural broad reading, then even the Leagues' reading of "to the extent" would allow new lotteries that follow the basic structure of prior lotteries, and would not require that the State had "actually conducted" those new lotteries in the past.

In all events, the term "to the extent" can plausibly be read as "if" in this context. The Sports Leagues recognize that as a matter of grammar and linguistics the phrase can be synonymous with "if." Opp. 14 n.3. But, they suggest such a reading is foreclosed by *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 510 U.S. 86 (1993). As the Leagues recognize, however, the term's meaning is influenced by its "surrounding text and context." Opp. 14. Thus, in *John Hancock*, this Court found only that reading the phrase "to the extent" as "if" in the ERISA provision at issue would contravene Congress' intent. 510 U.S. at 97 Indeed, since *John Hancock*, the Fifth Circuit declined to "read the phrase 'to the extent' as a limiting device" and instead interpreted it as "a proxy for 'to whatever extent' or 'to any extent.'" *Paradissiotis* v. *Rubin*, 171 F.3d 983, 987 (5th Cir. 1999).

Delaware's preferred reading is reinforced by PASPA's structure. Pet. 25-26. Congress used the same term in § 3704(a)(3) in a context that makes clear that it means "if." Pet. 25. Congress presumptively intends "the same construction of the same language in [a] parallel provision." *Hillsboro Nat'l Bank* v *Comm'r*, 460 U.S. 370, 402 (1983).

The Sports Leagues implicitly recognize that their reading of § 3704(a)(1) would allow only lotteries identical to those Delaware conducted in 1976. They, like the Third Circuit, seek to ameliorate this

absurdity by arguing that the law permits "de minimis" differences. Opp. 16. But, where, as here, "the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity." *Alarm Indus. Commc'ns Comm.* v. *FCC*, 131 F.3d 1066, 1068 (D.C. Cir. 1997). And, in light of that ambiguity, *Gregory* applies.

Finally, the legislative history confirms that Delaware's reading of § 3704(a)(1) is reasonable. Pet. 8-12, 26-29. The Sports Leagues ignore the provision's drafting history that shows Congress' intent to broaden the exception's scope. See, *e.g.*, *Hayden* v. *Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (en banc) (citing legislative history's importance in determining whether Congress intended "an alteration of the federal balance"). Indeed, in arguing that "Congress wanted to permit sports betting schemes only to the extent that States *actually* conducted such schemes," Opp. 14 (emphasis added), the Leagues reveal that their reading is based on a term that Congress *struck* in crafting PASPA. See Pet. 27. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). The Leagues also assert that legislative history is irrelevant because it contains contradictory statements. Opp. 17. But, the Senate Report's clarity about extending Delaware's lottery to "other sports" confirms that § 3704(a)(1) is at least ambiguous. Under *Gregory*, that ambiguity should be construed to permit Delaware to operate the sports lotteries it intended to offer.

III. DELAWARE WAS DENIED A FAIR PROCEEDING.

The Sports Leagues claim this Court should not review the question whether the Third Circuit appropriately decided this case on the merits on appeal from the denial of a preliminary injunction.

First, the Sports Leagues correctly observe that this Court has carved out an exception to its general rule that it is inappropriate for a court to reach the merits in a preliminary-injunction proceeding, when the trial court's ruling "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). But no other court of appeals would have concluded that this exception applies here. See Pet. 22. Here, the trial court denied the Leagues' preliminary injunction motion before the State even filed a brief in opposition, let alone presented its evidence, and where the court's focus had been on irreparable harm.

The Sports Leagues note the "facts about [Delaware's] gambling scheme in 1976 and the scheme it currently wishes to implement are undisputed," Opp. 20, and incorrectly assert that the specific disputed facts that Delaware would have presented to the trial court are irrelevant, *id.* at 21. For example, the question whether Delaware is implementing a different "scheme" (or making a "substantial" change) if it conducts the same lottery games using, *e.g.*, college football or Major League Baseball games instead of National Football League games, is not a pure question of law. It is an appropriate subject for expert testimony and factual development that turns on knowledge of the details of sports lotteries and how they are designed and

played. See Pet. 31. The Third Circuit's intuition that there were no factual issues underlines how inappropriate it was for that court to decide the merits on appeal from denial of a preliminary injunction.

Finally, Delaware does not seek review of the Third Circuit's process in isolation. Delaware contends that the Third Circuit's erroneous decision to reach the merits is worthy of review, because it finally resolved the scope of Delaware's right to exercise its Congressionally-preserved revenue-raising power in an unfairly truncated proceeding.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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